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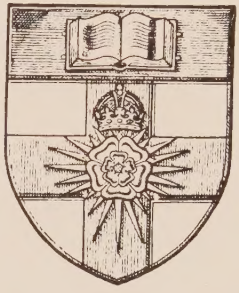

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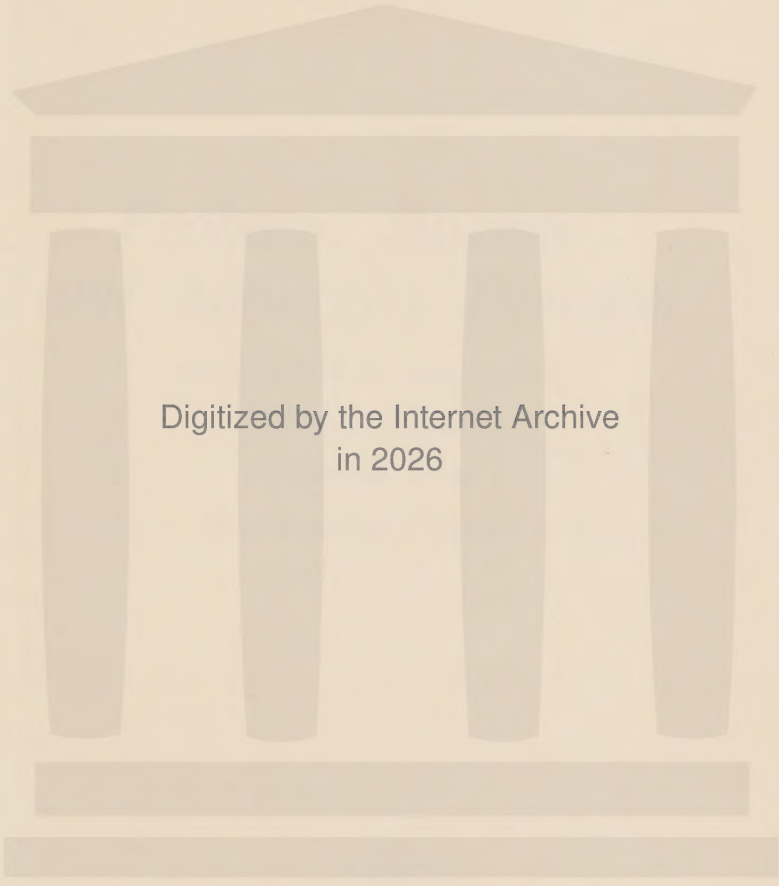

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Probate, Divorce, and Admiralty Division

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PROBATE DIVORCE & ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

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ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS

MILLER *v.* MILLER.

1960
May 30.

Marshall J.

Husband and Wife—Maintenance—High Court—Registered order—Variation by magistrates—Appeal—Adultery by wife—Principles to be followed—Position of judge hearing appeal—Maintenance Orders Act, 1958 (6 *&* 7 *Eliz.* 2, *c.* 39), *s.* 4.

A wife, after obtaining a decree absolute of divorce, was granted an order in the High Court for maintenance for herself and the three children of the marriage. That order was subsequently registered in a magistrates' court, under the Maintenance Orders Act, 1958. The husband applied to the magistrates' court to vary the maintenance order on the ground that the wife had committed adultery. The magistrates, holding that adultery by the wife had been proved, reduced the amount payable in respect of her maintenance from £400 per annum, less tax, to £26 per annum. On the wife appealing to the High Court:—

Held, (1) that since the court of registration had, by section 4 (2) of the Maintenance Orders Act, 1958, the same jurisdiction to vary any rate of payments in a maintenance order as was exercisable by the court which made the order, it must act upon the same principles and considerations as the High Court followed,

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[Reported by D. R. Ellison, Barrister-at-Law.]

1960

MILLER
v.
MILLER.

and in particular, the principle that the court should have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage; that the mere fact that a wife, after obtaining a maintenance order, had sexual intercourse with a single man, or committed adultery with a married man, did not of itself entitle a court to vary a maintenance order by reducing it to a nominal figure; such conduct should be taken into account and primarily be considered in the light of the difference it made in the relative financial position of the parties.

(2) That the position of a judge hearing an appeal from a magistrates' court under section 4 (7) of the Maintenance Orders Act, 1958, was the same as when hearing an appeal from a registrar under rule 61 of the Matrimonial Causes Rules, 1957, and was not analogous to that of a Divisional Court hearing an appeal under rule 73 of those Rules.

On the evidence, since the maintenance order was made, the wife had committed adultery and her financial position had improved to the extent of at least £2 15s. per week, there being no change in the husband's financial position. Accordingly, the just and reasonable order was a reduction in the wife's maintenance from £400 per annum, less tax, to £200 per annum, less tax.

APPEAL from Cullompton magistrates by summons adjourned into open court.

The parties were married in January, 1943. There were three children of the marriage, born in 1943, 1945 and 1947, respectively. On December 10, 1957, the wife obtained a decree absolute of divorce in an undefended suit on the ground of the husband's cruelty. By a registrar's order dated January 14, 1958, the husband was ordered to pay maintenance, during the joint lives of the parties, at the rate of £400 per annum, less tax, for the wife and £104 per annum, less tax, for each child. There was no dum sola et casta clause in the order. On April 20, 1959, that order was registered in Cullompton magistrates' court, under the Maintenance Orders Act, 1958. On February 29, 1960, the husband applied by summons to the Cullompton magistrates that the registrar's order dated January 14, 1958, be revoked or varied, on the ground that the wife had cohabited with a married man. On March 21, 1960, the magistrates held that the ground of the husband's complaint had been proved and ordered that the amount payable in respect of the wife's maintenance be reduced to £26 per annum. From that order the wife appealed.

Roger Ormrod Q.C. and *H. E. L. McCreery* for the wife.
Norman Skelhorn Q.C. and *J. H. Inskip* for the husband.

The case having been argued in chambers, no summary of the arguments is available.

MARSHALL J. This appeal is brought under the terms of section 4 of the Maintenance Orders Act, 1958. It is the first appeal of its kind to be heard and raises important points as to the principles which should govern the exercise by justices of the jurisdiction assigned to them by the Act.

Section 1 of the Act enables certain maintenance orders made by the High Court or a county court to be registered in a magistrates' court, and for certain maintenance orders made in a magistrates' court to be registered in the High Court.

When an order is registered in accordance with the terms of section 2, section 3 enacts that such registered order, whether registered in the High Court or a magistrates' court, " . . . shall be " enforceable in all respects as if it had been made by the court " of registration and as if that court had had jurisdiction to " make it; ".

Section 4 gives power to magistrates' courts to vary the rate of payments under High Court or county court orders registered with them, but is silent on, and makes no provision for, variation by the High Court of the rate of payments under magistrates' orders registered with it.

By section 4 (2) (*a*) " the court of registration may exercise " the same jurisdiction to vary any rate of payments specified " by a registered order . . . as is exercisable, apart from this " subsection, by the original court."

By section 4 (2) (*b*) the jurisdiction to vary a rate of payments, when once an order is registered and remains registered, can only be exercised by the court of registration or any other magistrates' court to which the jurisdiction conferred by section 4 (2) (*a*) is extended by rules of court. There are two limitations to the jurisdiction conferred under this section upon the court of registration: (i) If at the time of the application to vary one of the parties to the order is not present in England, the court has no power to vary (section 4 (2) (*a*)), and (ii) they have no power to increase the rate of payment beyond £5 per week although they can reduce a greater rate of payments under the order, as registered, to a figure in excess of £5 (section 4 (3)). If it is felt to be appropriate, by reason of these stated limitations or for any other reason, the court can remit the application to the original court, who can then deal with it as if the order had not been registered (section 4 (4)).

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It is important to note that the power thus exercisable by the court of registration is confined to a power to vary the rate of payments. It does not extend to a power to vary any other term embodied in the order. It has no power to revoke an order.

If it is desired to vary any provision of the registered order other than the rate of payments and if one of the parties at the time of the application is out of England, the appropriate court to which application should be made is the court making the original order (section 4 (5)).

The right of appeal under section 4 is given by subsection (7), which is in the following terms: " Where a magistrates' court, " in exercise of the jurisdiction conferred by subsection (2) of this " section, varies or refuses to vary a registered order, an appeal " from the variation or refusal shall lie to the High Court; and so " much of subsection (1) of section 63 of the Supreme Court of " Judicature (Consolidation) Act, 1925, as requires an appeal " from any court to the High Court to be heard and determined " by a Divisional Court shall not apply to appeals under this " subsection."

Section 5 sets out the terms under which the registration of any order may be cancelled. On the facts of this case it is not necessary to make any detailed examination of its terms.

The course this case took before the justices shows that it is necessary to stress the fact that the jurisdiction conferred upon them under section 4 of the Maintenance Orders Act, 1958, is a different jurisdiction from that which they exercise under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended.

Under the latter section, their power is fundamentally different; it is wider; it is not confined merely to a variation of the rate of payments; it extends to a power to discharge an order altogether or to vary any of its terms. Subject to certain provisos it enjoins the justices to discharge an order made in favour of a wife, on proof of her adultery.

Under section 4 (2) of the Maintenance Orders Act, 1958, " the " court of registration may exercise the same jurisdiction to vary " any rate of payments . . . as is exercisable . . . by the original " court." It must therefore act upon the same principles and considerations as the High Court has to follow in exercising the same jurisdiction and which is governed by sections 19 to 29 of the Matrimonial Causes Act, 1950, and has been explained in a number of decided cases.

As the magistrates' jurisdiction is confined to a power to vary the rate of payments, particular attention should be called to section 28 of the Matrimonial Causes Act, 1950, which deals with the High Court's powers to vary and discharge orders for alimony and maintenance. Subsection (3) is in the following terms: "In "exercising the powers conferred by this section, the court shall "have regard to all the circumstances of the case, including any "increase or decrease in the means of either of the parties to the "marriage." It is neither possible nor advisable to set out all the circumstances which have moved the High Court, or should move it, to vary maintenance orders. These are many and sometimes they are unusual and unexpected. Always the relative financial resources and the capacity and opportunity to earn of the parties must be taken into account. In the absence of a dum sola et casta clause, remarriage of itself does not provide a ground for reducing a maintenance order, although it is a factor which must be taken into account when a court considers whether the fortune of a wife has increased thereby because the second husband is in the nature of a pecuniary asset to her.

The remarriage of a husband should also be considered in the context of whether it has thereby decreased his resources: *Wood* v. *Wood* [1]; *Perkins* v. *Perkins* [2]; *Bellenden* v. *Satterthwaite*.[3]

The conduct of the parties is another circumstance that falls to be considered. If a man so disregards his own duties to his wife as to drive her from home, without any fault on her part, and thereby to cause her to seek a divorce he should, consistent with his means, be called upon to make some contribution towards maintaining her in reasonable comfort, having regard to her age, health and position in society. If the wife by her conduct has contributed to the breakdown, this also should be taken into account.

The mere fact that the wife, after obtaining a maintenance order has had sexual intercourse with a single man, or committed adultery with a married man, does not of itself entitle a court to vary the order by reducing it to a nominal figure. Such conduct should be taken into account and primarily be considered in the light of the difference it makes in the relative financial position of the parties. If a divorced wife who has remarried and has acquired from her second husband a right to be maintained is still entitled to some support from her first husband, it follows that a

[1] [1891] P. 272; 7 T.L.R. 463, C.A.

[2] [1938] P. 210; 54 T.L.R. 887; [1938] 3 All E.R. 116.

[3] [1948] 1 All E.R. 343, C.A.

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divorced wife who lives with another man without going through a second ceremony of marriage and who accordingly acquires no such right to maintenance from that man, is not necessarily disentitled to maintenance from her husband without again considering the relative financial position of the parties.

Where the maintenance order is in favour of a woman who is given the custody of the children, her obligation to the children might well make it necessary or advisable in the interests of the children to maintain a separate establishment in which they can be reasonably brought up. This is another circumstance to be kept in view.

These are circumstances which often arise in these cases. There are many others. The overriding consideration to be borne in mind is that in considering such matters the justices are exercising a discretionary jurisdiction and their duty is to exercise it judicially, according to the evidence, and thereby to arrive at a decision that is reasonable and just between the parties.

I now have to consider the submissions made to me by counsel concerning my position and duty in considering this appeal. It was submitted to me by Mr. Ormrod on behalf of the wife that my position in this case is no different from that of any judge in chambers considering under rule 61 of the Matrimonial Causes Rules, 1957, an appeal from an order for maintenance made by a registrar of the Probate Division under the provisions of rules 51 and 52 of the Matrimonial Causes Rules, 1957.

In *Evans* v. *Bartlam*,[4] Lord Atkin clearly stated how in such circumstances a judge should approach his duty: "I wish to "state my conviction that where there is a discretionary jurisdic- "tion given to the court or a judge the judge in chambers is in "no way fettered by the previous exercise of the master's discre- "tion. His own discretion is intended by the rules to determine "the parties' rights: and he is entitled to exercise it as though "the matter came before him for the first time. He will, of "course, give the weight it deserves to the previous decision of "the master: but he is in no way bound by it. This in my "experience has always been the practice in chambers, and I "am glad to find it confirmed by the recent decision of the Court "of Appeal in *Cooper* v. *Cooper*,[5] with which I entirely agree."

On the other hand, Mr. Skelhorn has submitted that as this is an appeal from justices which, but for section 4 (7) of the Maintenance Orders Act, 1958, would have been heard by a Divisional

[4] [1937] A.C. 473, 478; 53 T.L.R. 689; [1937] 2 All E.R. 646, H.L.

[5] [1936] W.N. 205.

Court of this Division, I should exercise my jurisdiction in the same manner as a Divisional Court and approach my task as a Divisional Court exercising its appellate jurisdiction. In such a case my discretion is a more limited one governed by the terms of rule 73 of the Matrimonial Causes Rules, 1957, and my powers would be different.

I have come to the conclusion that the submission of Mr. Ormrod is the right one. The registration of maintenance orders in different courts as provided for in the Maintenance Orders Act, 1958, is designed to increase the convenience of, and reduce the costs to, litigants in the enforcement and variation of such orders as come within its terms.

Within the limitations set out in section 4, it gives to the justices the same jurisdiction as is exercised by the High Court and, as I have already stated, it should be exercised by applying the same considerations as the High Court would apply. In the circumstances contemplated in section 4 (4), the justices can remit the application to the original court, in which case, where the original order was made by the High Court, it would fall to be dealt with by the registrar as if the order had not been registered. Any order of the registrar in these circumstances, if appealed against, would go under rule 61 of the Matrimonal Causes Rules, 1957, to the judge in chambers. It would be anomalous if an appeal from the justices direct under section 4 (7) were to be heard and decided by a judge in chambers as if he were exercising a Divisional Court jurisdiction.

I have come to the conclusion that the true view is that in exercising the jurisdiction given to them by section 4, the justices are merely, for considerations of convenience, and saving of expense, acting in the place of the registrar, and that any appeal from their decision should be dealt with by the judge in chambers, in the same way as orders of the registrar are dealt with in cases where there has been no registration in any other court. I am aware that justices can only act on oral evidence, whereas before a registrar the evidence is presented by way of affidavit first and only orally thereafter upon the registrar's order. But these are procedural differences only which render more necessary the taking of a careful note of the evidence by the clerk to the justices, so that a full and reliable note of the evidence is available to the judge at the hearing of the appeal.

[His Lordship referred to the facts of the case, and continued:] The summons issued by the husband on February 29,

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1960, asked that the order of January 14, 1958, registered in the petty sessional division of Cullompton, be revoked or varied.

The ground given was that the wife had cohabited with Charles Radford of Bridge House, Bridge Street, Uffculme, Devon, being a married man whose wife was still living and whose marriage still subsisted. This summons was stated to be issued under sections 43 and 53 of the Magistrates' Courts Act, 1952. Section 53 is the section under which the justices are given power to " revoke, revive or vary " an order made in a magistrates' court.

It will be seen, therefore, that the form of summons is appropriate to an application to discharge or vary an order under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, as amended, on the ground of adultery. It raises no question of any alteration in the financial resources of the parties.

The case was heard by the justices on March 21, 1960. I have been supplied with a copy of the notes of evidence given at the hearing, and upon which they decided to reduce the annual payment to the wife to £26 per annum, and the reasons upon which they acted.

The first reason given is that " they were satisfied that Mrs. " Miller had given birth to a still-born child on February 17, 1960, " of which her ex-husband was not the father, and that Mr. " Radford frequently spends the night with Mrs. Miller at Spring- " field House, Burgage, Wellington, Somerset."

The evidence on both these points was exceptionally strong and no one could quarrel with the justices' findings on these points.

The second and third reasons show that the justices were alive to the fact that their powers in the case differed from those exercisable by virtue of the provisions of section 7 of the Summary Jurisdiction (Married Women) Act, 1895. But they do not show that they fully appreciated the differences in approach called for by the exercise of this new jurisdiction. There is, for example, no reference to any finding that since the making of the original order any changes in the financial positions of the parties had taken place.

The fifth and last reason given by the justices indicates the operative consideration which caused them to vary the wife's rate of payments to £26. It states: " We decided that it would " be morally indefensible to expect Mr. Miller to maintain his " ex-wife for the benefit of another man with whom she appeared " to be living quite openly. At the same time, Mrs. Miller has

"custody of the children and receives money for their maintenance. The children are sufficiently old that they do not constitute a perpetual tie restricting Mrs. Miller's ability to seek employment if she wishes but, on the other hand, their presence means that she is not a completely free agent."

This is coming dangerously close to acting as a court of morals and holding that to live in open adultery with another man is, by itself, a ground for varying the payment of maintenance to a nominal amount.

But that is not the law, and I have to address my mind to the evidence to see what was proved before the justices. Before doing so, I must bear in mind that the husband did not defend the charge of cruelty, nor did he raise any counter-charge against her. This is, therefore, a case where the husband brought about the breakdown of this marriage, and there is nothing to suggest that the wife, by her conduct, contributed to that breakdown.

Any decision should therefore be based on the wife's conduct since the decree absolute, and particularly on any change in the relative financial position of the parties since Mr. Registrar Ligertwood made his order on January 14, 1958.

I have, accordingly, considered with anxious care the evidence laid before the justices, and I am satisfied that it entitles me to come to the following conclusions: (1) There was no evidence whatever of any change in the husband's financial position. (2) Having regard to the fact that no documentary evidence, such as a rent book, was produced to help establish that the wife occupied Springfield House, Burgage, as Mr. Radford's tenant; and that in her affidavits sworn for the purpose of the proceedings before the registrar she swore the payment of £2 15s. per week was in respect of the "use and occupation" of Springfield House and, finally, to the fact that Mr. Radford, in the course of an adulterous relationship, spends many nights sleeping at the house, I do not accept that any sum whether by way of rent or otherwise is paid by the wife to Mr. Radford. I believe the true position to be that the wife's financial position, since the registrar made his order, has now improved to the extent of at least £2 15s. per week in that she occupies the house without payment. (3) There is no evidence that Mr. Radford pays the wife any other allowance. That was his sworn testimony and he was called as a witness on behalf of the husband. Mr. Radford has a wife and home to keep. But there was evidence that Mrs. Miller accompanied Mr. Radford on holidays. I think it is probable

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Marshall J.

that in this and other respects Mrs. Miller receives some financial benefits through her association with him, although such benefits are irregular and limited. (4) Although the wife might well have some earning capacity, were she free to go out to work, in the circumstances, with three children to look after and provide for, I do not think it reasonable to expect her to do so.

I have considered very carefully whether I ought not to send this case back to the justices for reconsideration, and if they thought proper to hear further evidence or, alternatively, to call further evidence before me, and have decided that there is sufficient material for me to come to a decision and, in the circumstances, rather than put the parties to further expense, I propose to deal with the matter on this appeal.

Taking all the above circumstances into account, and also the fact that the wife has not acquired and cannot yet by marriage acquire a legal right to be maintained by Mr. Radford, I have come to the conclusion that the justices reduced the rate of payments in respect of her maintenance much too drastically at this stage.

It may be that later, with further evidence, the reduction could be justified, and the husband still has a right to seek a further reduction, if and when such evidence is available.

On the material before me I think the just and reasonable order to make would be to halve the present maintenance rate in respect of the wife.

I, accordingly, allow her appeal and order that she be paid maintenance at the rate of £200 per annum, less tax, as from March 21, 1960. The rates of payment in respect of the children, of course, remain unaltered.

Appeal allowed.

Solicitors: *Jaques & Co. for Clarke, Willmott & Clarke, Wellington, Somerset; Penny & Harward, Tiverton, Devon.*

1960
April 13.

Collingwood J.

LE MARE *v.* LE MARE.

Husband and Wife—Maintenance—Divorce—Children—Whether court has power to order maintenance for child beyond the age of 21—*Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 26.

The court has power under section 26 of the Matrimonial Causes Act, 1950,[1] to order the payment of maintenance for a child beyond the age of 21 years.

Thomasset v. *Thomasset* [1894] P. 295; 10 T.L.R. 591 considered.

APPLICATION for maintenance of child.

A wife petitioner was granted a decree nisi of divorce on December 14, 1959, on the ground of her husband's adultery. The decree was made absolute. She issued a summons seeking an order for secured provision, for maintenance for herself, maintenance for the child of the family, Robert, who was 20 years old at the date of the hearing, from the date of decree absolute until April 1, 1963, and for payment to the child of such additional sum as was necessary to pay for the child's tuition and examination fees. The summons was referred by the registrar to a judge.

Joseph Jackson for the wife. It is conceded that it has generally been the practice in the Divorce Division not to make orders for the maintenance of a child beyond the age of 21. The vital consideration, however, is the true construction of section 26 of the Matrimonial Causes Act, 1950, by which the court is empowered to "make such provision as appears just with respect to "the custody, maintenance and education of the children the "marriage of whose parents is the subject of the proceedings." It is important to note that the whole trend of both case and statute law during recent years in approaching questions regarding the duties and obligations of parents towards children has been a liberalising one, tending to extend the existing law in the favour of the child. Until *Galloway* v. *Galloway*[2] it was thought that

[1] Matrimonial Causes Act, 1950, s. 26: "(1) In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children the "marriage of whose parents is the "subject of the proceedings, or, if it "thinks fit, direct proper proceedings "to be taken for placing the children "under the protection of the court. . . . "(3) On any decree of divorce or nullity of marriage, the court shall "have power to order the husband, "and on a decree of divorce made on "the ground of the husband's insanity, shall also have power to "order the wife, to secure for the "benefit of the children such gross "sum of money or annual sum of "money as the court may deem "reasonable, and the court may for "that purpose order that it shall be "referred to one of the conveyancing "counsel of the court to settle and "approve a proper deed or instrument "to be executed by all necessary "parties.

"Provided that the term for which "any sum of money is secured for the "benefit of a child shall not extend "beyond the date when the child will "attain twenty-one years of age."

[2] [1956] A.C. 299; [1955] 3 All E.R. 429.

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the above words applied only to children of the parties in the strict sense, but that decision established that illegitimate children of the parties were within the section. The same trend is to be observed in the various provisions of the Legitimacy Act, 1959, and especially in so far as it repealed section 1 (2) of the Legitimacy Act, 1926.

The decision in *Galloway* v. *Galloway*[3] was extended by the Matrimonial Proceedings (Children) Act, 1958, section 1 (1), which brought within the provisions of section 26 of the Act of 1950 the child of one party to the marriage who had been accepted by the other party as a child of the family (see also Matrimonial Causes Rules, 1957, as amended, rule 4). It is submitted, therefore, that in construing "children" in section 26 the attitude of the court should be a liberal one, and if on the wording of the whole section "children" is capable of including a child over the age of 21, the court should not refrain from placing that interpretation on the word, since this is a case in which, in the words of Lord Radcliffe in *Galloway* v. *Galloway*,[4] "it is sought not to deny a jurisdiction hitherto asserted but to "assert a jurisdiction not hitherto exercised." The correct approach to the construction of section 26 is set out in the speech of Lord Tucker.[5]

Section 26 (1) of the Act of 1950 refers to "children." That word carries no definite implication as to age and no specific restriction as to age appears in the subsection. The same is true of section 26 (3), which refers to secured maintenance, save that the proviso to that subsection states that secured provision for a child shall not extend beyond the date when the child will attain the age of 21. Reliance is placed on that subsection as an indication that "children" in other portions of section 26 is to be construed without limitation as to age. That proposition is supported by the fact that section 23 of the Act of 1950 and section 1 (4) of the Matrimonial Proceedings (Children) Act, 1958, which extends the scope of section 23, both use the term "infant "children," thus showing that, at the time of the passing of both Acts, the legislature had in mind the distinction between "children" and "infant children": see also sections 9, 24 and 25 of the Matrimonial Causes Act, 1950.

In *Thomasset* v. *Thomasset*[6] the argument was as to the construction of a different statute, and the Court of Appeal was not

[3] [1956] A.C. 299.
[4] Ibid. 320.
[5] Ibid. 323.
[6] [1894] P. 295; 10 T.L.R. 591.

asked to consider the position of children beyond the age of 21; indeed, that decision enlarged the jurisdiction and did not restrict it.

In all the circumstances, " children " in section 26 of the Act of 1950 should be construed as not bearing any restriction as to age. If the court has jurisdiction then the present case falls to be considered on its merits.

Victor Williams for the husband. " Children " in section 26 of the Act of 1950 means one who is not over the age of 21 years. It has never been the practice to order maintenance to be paid in respect of children over 21 years, and that practice is consonant with reality and common sense. But the matter goes further than that; in *Thomasset* v. *Thomasset*[7] the Court of Appeal, overruling *Blandford* v. *Blandford*,[8] held that the court was empowered under section 35 of the Matrimonial Causes Act, 1857 —the provision then in force—to make orders for the custody, maintenance and education of children until they attain the age of 21 years. That decision is, it is conceded, of persuasive authority but, in view of the fact that it has not been departed from for 60 years, it should be followed by this court.

Where a statutory provision has been given an interpretation by judicial decision which has been followed in practice over a long period, that interpretation ought not to be departed from merely on a basis of inferences such as have been propounded on behalf of the wife in this application. This is all the more so when such an interpretation as is now sought to be placed on section 26 may lead to the manifest absurdity of applications for the maintenance of children being made without regard to any limitation as to the age of the child concerned.

Joseph Jackson in reply. The ratio decidendi of *Thomasset* v. *Thomasset* was that orders for maintenance might be made in respect of children between the ages of 16 and 21 years. Moreover, that decision was on section 35 of the Act of 1857, which contained no proviso such as that contained in section 26 of the Act of 1950. That decision is, therefore, to be distinguished from the present case.

COLLINGWOOD J. referred to the facts and continued: The question raised is whether the court has power to provide maintenance for a child beyond the age of 21 years. [His Lordship referred to the Matrimonial Causes Act, 1950, s. 26 (1) and (3), and continued:]

[7] [1894] P. 295.

[8] [1892] P. 148.

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Collingwood J.

It is to be observed that section 26 (1) speaks of " children " the marriage of whose parents " without any restriction as to age. Furthermore, the proviso says that where the money is secured for the benefit of a child, then it shall not extend beyond the date when the child attains 21 years. This specific restriction in respect of secured maintenance would seem to indicate that unsecured payments were the subject of no such restriction, otherwise there would be no necessity for this proviso. Again, if one looks at section 23 of the same Act, it is provided: " Where a " husband has been guilty of wilful neglect to provide reasonable " maintenance for his wife or the infant children of the marriage, " the court, if it would have jurisdiction to entertain proceedings " by the wife for judicial separation, may, on the application of " the wife, order the husband to make to her such periodical " payments as may be just; . . ." In that section it is to be observed that the power is restricted to " infant children " specifically. Section 24 gives the court power to order settlement of the wife's property for the benefit of " the children of the " marriage " without the use of the word " infant "; and in section 25, which relates to the power of the court to make orders as to application of settled property, again there is no restriction as to age.

Furthermore, the Matrimonial Proceedings (Children) Act of 1958, under section 1 (1), which extends the jurisdiction of the court to further classes of children, refers specifically to section 26 of the Act, whilst section 1 (4), which deals with cases of wilful neglect to provide reasonable maintenance, refers to section 23 of the Act—apparently indicating that the legislature had in mind the distinction between " child " and " infant child."

The case cited in support of the proposition that the power of the court is limited to the age of 21 years was *Thomasset* v. *Thomasset*.[1] The headnote of that case reads: " The court has " power to make orders respecting the custody, maintenance and " education of children during the whole period of their infancy " —that is, till they attain the age of 21 years "; and *Blandford* v. *Blandford*[2] was overruled by the Court of Appeal.

The facts in *Thomasset* v. *Thomasset*[3] were shortly these. It was an appeal from Sir Francis Jeune P. On March 15, 1892, the petitioner, Mrs. Thomasset, obtained a decree of divorce from her husband, the respondent. On August 8, 1893, an order was

[1] [1894] P. 295; 10 T.L.R. 591.
[2] [1892] P. 148; 8 T.L.R. 381.
[3] [1894] P. 295.

made for the payment by the husband to the wife of permanent alimony at the rate of £266 a year and £23 6s. 8d. for the maintenance and education of each of the four younger children of the marriage. On March 27, 1894, the eldest of these four children attained the age of 16 years, and on June 1, 1894, an order was made by the registrar, on the application of the husband, that the allowance of £23 6s. 8d. in regard to that child should cease. That order was confirmed by Sir Francis Jeune P., who considered that he was bound by the authority of *Blandford* v. *Blandford*,[4] and from that decision the wife appealed, and the Court of Appeal allowed the appeal.

I need refer only to a portion of the judgment of Lindley L.J.[5] He says: "In my judgment, the wide discretion conferred on the "Divorce Court by the Divorce Acts has been unduly restricted "by judicial decisions. Such discretion ought to be exercised "in each particular case as the circumstances of that case may "require; and in exercising such discretion the Divorce Court, "which has all the old powers of the Court of Chancery, is not "and ought not to consider itself fettered by any supposed rule "to the effect that it has no power to make orders under the "Acts respecting the custody, maintenance and education of "infants who, being males, are over 14, or who, being females, "are over 16. I am clearly of opinion that, whether the children "are males or females, the jurisdiction conferred by the sections "of the Divorce Acts on which this case turns can, since the "Judicature Acts, at all events, be exercised during the whole "period of infancy—that is, until the children, whether males "or females, attain 21; although I do not say that a child who "has attained years of discretion can, except under very special "circumstances, be properly ordered into the custody of either "parent against such child's own wishes. The appeal must "therefore be allowed, . . ."

That decision was under section 35 of the Matrimonial Causes Act, 1857, and in that section there was no proviso such as there is to section 26 of the Act of 1950, and in my opinion the wording of section 26 and the proviso thereto shows that there is no such restriction under that section. The order will, therefore, be made in accordance with the wife's summons.

Solicitors: *Oswald Hickson, Collier & Co.; Withers & Co.*

E. J.

[4] [1892] P. 148.

[5] [1894] P. 302.

1960
June 15, 16.

Lord Merriman P. and Marshall J.

COOKE *v.* COOKE.

Husband and Wife—Maintenance—Justices—Child—Whether reasonable belief in wife's adultery defence to failure to maintain child—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39), *s.* 4.

The parties were married in 1952. In March, 1958, the husband left the wife, and the wife complained to the magistrates that the husband had deserted her; to that complaint the husband made a cross-complaint that the wife had committed adultery with R. At the hearing of the complaint and cross-complaint, the wife's charge of desertion was dismissed, and the husband was granted a separation order on the ground of the wife's adultery with R. On a date which the evidence did not clearly fix, but which must have been before February 8, 1959, the parties resumed cohabitation. On September 17, 1959, the wife gave birth to a child and on September 28, 1959, the husband finally left the wife, alleging that he did so because of her association with B. On October 1, 1959, the wife complained to the magistrates that the husband had deserted her and that he had been guilty of wilful neglect to provide reasonable maintenance for her and her infant child whom he was legally liable to maintain. The magistrates found that the wife had induced in the husband a reasonable belief that she had committed adultery with B., and dismissed the complaint of desertion. They further held that the complaint of wilful neglect to maintain the wife and her child stood or fell with the complaint of desertion and, accordingly, dismissed that complaint also. Although the wife did not challenge the finding of the magistrates that the husband reasonably believed that she had committed adultery, she appealed against the dismissal of the complaint of wilful neglect to maintain her child. There was a doubt, on the evidence before the magistrates, whether the child was the husband's child. It appeared, however, that further evidence on that issue was available:—

Held, (1) that reasonable belief by the husband that the wife had committed adultery was an answer to the complaint of desertion and of wilful neglect to maintain the wife; it was not, however, an answer to the complaint, which was in law a separate complaint, of wilful neglect to maintain the child. The case should therefore be remitted to the magistrates for a rehearing of the complaint of wilful neglect to maintain the child.

Dicta of Lord Merriman P. in *Kinnane* v. *Kinnane* [1954] P. 41, 43; [1953] 3 W.L.R. 782; [1953] 2 All E.R. 1144, D.C. and *Starkie* v. *Starkie* (*No. 2*) [1954] 1 W.L.R. 98, 106; [1953] 2 All E.R. 1519, D.C. applied (post, pp. 22, 26, 27).

(2) That the fact that at the rehearing, evidence might be adduced on the issue of the paternity of the child which could

[Reported by D. R. Ellison, Esq., Barrister-at-Law.]

reasonably have been available at the first hearing, was not a sufficient reason for refusing to remit the case.

Quaere, whether, at the rehearing, the child should be separately represented.

APPEAL from the magistrates for the Strangeways Division of Manchester.

A wife complained under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1949, that her husband had deserted her, and that he had been guilty of wilful neglect to provide reasonable maintenance for her and for her infant child whom he was legally liable to maintain. The husband alleged, and the magistrates found, that the wife, by her conduct, had induced in the husband a reasonable belief that she had committed adultery. On the basis of that finding, the magistrates dismissed the complaints of desertion and wilful neglect to provide reasonable maintenance for the wife and the child, holding that the complaint of wilful neglect to maintain stood or fell with the complaint of desertion. The wife appealed against that part of the magistrates' order which dismissed her complaint of wilful neglect to maintain the child.

C. Trevor Reeve for the wife. The magistrates were wrong in thinking that the charge of wilful neglect to maintain stood or fell with the charge of desertion. The charge of wilful neglect to maintain the wife and the charge of wilful neglect to maintain the child whom the husband is legally liable to maintain are two separate offences, and should have been considered separately. If the wife induced in the husband's mind a reasonable belief that she had committed adultery, that would provide the husband with an answer to the charge of desertion and to the charge of wilful neglect to maintain the wife, but not to the charge of wilful neglect to maintain the child. On the latter charge, the only question is whether the child is one whom the husband is legally liable to maintain.

H. J. M. Tucker for the husband. The husband's liability to maintain the child only arises if the child is a child of the marriage. There is evidence available, touching the question of the paternity of the child, which was not before the magistrates. The fact that, at a rehearing, such further evidence could be adduced, and that such evidence might, with reasonable diligence have been available at the first hearing, is not a reason for refusing a rehearing.

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LORD MERRIMAN P. The magistrates dealt with two complaints numbered 1 and 2, but, in truth and in fact, they had three complaints before them, which, following the same numeration, ought to have been numbered 1, 2 (a) and 2 (b). The complaints were these: desertion, wilful neglect to provide reasonable maintenance for the wife, and wilful neglect to provide reasonable maintenance for the child whom the husband was legally liable to maintain. In form, as I say, these complaints were numbered: 1. desertion on September 28, 1959, and 2. the two charges of wilful neglect coupled with the word "and."

The whole point of this appeal is that the complaint of wilful neglect to maintain the infant child, whom the husband was legally liable to maintain, has never been dealt with at all as a separate issue. The husband's defence to both the charge of desertion and the charge of wilful neglect to maintain the wife was that he had reasonable grounds for believing that she had committed adultery, reasonable grounds induced by the wife's own conduct, not by gossip or hearsay, and it is admitted for the purposes of this appeal that that finding is unquestionable.

For that reason the magistrates held that the husband was not in desertion and that complaint was dismissed; from that dismissal there is no appeal. The magistrates go on: "The wife's further "complaint (that the husband had wilfully refused to maintain "her) is, in our opinion, related to the charge of desertion and "following *Chilton* v. *Chilton*,[1] must stand or fall with it. As "we hold the husband not to be in desertion, it therefore follows "that he is not guilty in these circumstances of wilfully refusing "to maintain his wife, and the second complaint is therefore "dismissed."

It is plain on the face of that statement of reasons that they have never considered as a separate issue whether the fact that the wife has induced reasonable belief that she has committed adultery to the mind of her husband is or is not an answer to the separate complaint of wilful refusal to provide reasonable maintenance for the child whom he is liable to maintain, and this appeal started on the footing that we ought to determine, as clearly we must determine, whether, on any view of the matter, the reasonable belief issue applies to the complaint of wilful neglect to provide reasonable maintenance for the child.

It is plain now that that is not the only issue. There was a faint but definite attempt at the trial to raise the issue of the

[1] [1952] P. 196; [1952] 1 T.L.R. 1316; [1952] 1 All E.R. 1322, D.C.

husband's paternity of the child. We have been told in the course of this case, which has been extremely well argued by counsel on both sides, that there is available a great deal more evidence, to which I will come presently, on that issue. Therefore, in the last resort, though it is no doubt necessary for us to express an opinion about the effect of reasonable belief in adultery on the wilful neglect in respect of the child, it may turn out that that issue is academic, because the whole question of maintaining the child may fall to be decided on the basis that this child is not a " child of the marriage " and is, therefore, not a child in respect of whom custody could be awarded to the wife, and for the same reason is not a child in respect of whom that custody could be accompanied, under the Married Women (Maintenance) Act, 1920, with an order for maintenance in respect of the child.

I shall try as far as possible to avoid expressing any concluded opinion about the facts in issue in this case, because I have come to the conclusion that it is a case in which we must order a rehearing. I wish, however, to make this plain: so far as we know, the directions of this court, particularly in respect of reasonable belief in adultery, about which we have said that the wife ought to be informed of the substance of the case, were never complied with at all. I am not stating it as a positive fact that they were not complied with, but we have no reason to suppose that they were. Counsel were not in the case below, and therefore cannot speak of their own knowledge but only, as I understand it, on such instructions in the matter as they are able to obtain from London agents. It is of considerable importance in this case that those directions were not complied with, because there is mention of the fact that at relevant periods the wife was involved with three men in all, of whom two are or may be very particularly involved.

To make that clear I must now mention certain dates. The marriage took place in 1952. In March, 1958, the husband left the wife for the first time. That is not the subject of the charge of desertion in the present case, but was the subject of an earlier complaint of desertion which was made in April, 1958. To that complaint the husband made a cross-complaint of adultery with a man named Rowe, and when the case came on for hearing in July, 1958, the wife's charge of desertion was dismissed, and a separation order was made in favour of the husband on the ground of her adultery with Rowe. That separation order was not, so far as I know, the subject of any appeal, nor was the

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dismissal of her complaint of desertion. The result was, again so far as any evidence in the case of which I am aware shows, that the separation order stood until at a certain date, which was left hopelessly vague on the court's notes of the evidence, the husband and wife resumed cohabitation, with the implication, amongst other things, that the adultery which must have been committed before the date of the husband's cross-complaint on the ground of adultery, was condoned.

Certain documents have been put in before us. One, which was described before the magistrates as the "suicide note," being a letter written by the wife for the benefit of the coroner when she apparently attempted unsuccessfully to commit suicide. This was written on February 8, 1959, from the matrimonial home, which was then at a place called Gorse Hill, near Stretford. From that note I think it is reasonable to conclude that Rowe, who had himself committed suicide, had written her a letter, which she asserts the husband saw, justifying to her his act. Counsel has informed us, on instructions, that Rowe's letter contained a sentence which could be interpreted as an admission on his part that he was the father of an expected child, and as being some evidence against the wife inasmuch as she had received this letter apparently without protest and, as I have said, acknowledged its having been seen by the husband in the "suicide note" of February 8, 1959. I am not going to say any more about the validity of that evidence, or the use that could have been made of it for the purpose of cross-examining the wife or persuading the court that Rowe, and not the husband, was the father of this child. I will only add that it is also said that there is now available a witness living in the Manchester district who would speak to an admission made by the wife as to the stage her pregnancy had reached when Rowe killed himself. This, it is said, would also throw considerable light on the question of the paternity of the child.

The inference we are invited to draw (and again I am not expressing any concluded opinion about it beyond saying that it is a possible inference from the references in the "suicide note" to the letter which the wife said she received from Rowe and which was seen by the husband on February 2) is that Rowe had already committed suicide on some date before, and I think one may say, shortly before, February 2, 1959, leaving this letter for the wife, which is now presumably in the possession of the coroner; that the husband, according to the wife's "suicide

"note," saw Rowe's letter on February 2; that the husband returned to cohabitation when Rowe was dead; and that he was back in the house again on or about February 8, when the wife wrote the letter to which I have already referred. As I say, I am not stating that these are facts, but merely that they are suggested as being reasonable conclusions, although inconsistent with other statements about the date when the husband and wife resumed cohabitation.

That brings me to the point about the failure to particularise the reasonable belief in adultery. In spite of that failure I think it is reasonably plain that what was being discussed and relied on was the belief that after this resumption of cohabitation the wife had taken up with a man named Brindley. It is admitted that the circumstances of her association with Brindley are such that the magistrates were justified in their finding that she had induced a reasonable belief that she was committing adultery with Brindley. It is therefore not necessary to say more than that at the time of the hearing she and Brindley were living under the same roof in circumstances which were consistent with their doing so as the result of a guilty affection between them. It is quite plain to my mind that the question of any continuance of the adultery with Rowe was not really being pursued at all from the point of view of reasonable belief in adultery, although it is plainly suggested now that up to the time when Rowe committed suicide the adulterous association which had been found to exist in July, 1958, was still persisting. It is suggested, therefore, that as the husband and wife were, as it is said, not living together at all at that time, there is evidence from which the true inference is that Rowe was the father of the child.

The first issue to be decided is that which concerns the effect on the complaint of wilful neglect to maintain the child of the reasonable belief in adultery with Brindley. In my opinion, there is no direct authority on the point, but I think some guidance, and we are invited to say that considerable guidance, is to be derived from *Starkie* v. *Starkie (No. 2)*,[2] which was decided by myself and Collingwood J. in this court. Without reading long citations from that judgment, the substance of the case was this: On the one hand there is the effect of a finding of adultery upon any order in respect of wilful neglect to maintain a child. About that, as we plainly indicated, there could be no argument at all. Section 6 of the Summary Jurisdiction (Married Women) Act,

[2] [1954] 1 W.L.R. 98; [1953] 2 All E.R. 1519, D.C.

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1895, would be conclusive, because no order can be made under the Act on the complaint of a married woman if it shall be proved that such married woman has committed an act of adultery, with a saving proviso about condonation, connivance, and conduct conducing, to which I need not more particularly refer. Seeing that an order in respect of wilful neglect to provide reasonable maintenance for a child is an order made in favour of the wife, no such order could possibly be made if adultery had been committed. In *Starkie* v. *Starkie* (*No. 2*),[3] on the other hand, we were dealing with a case in which the wife had disabled herself from getting an order for wilful neglect to maintain herself by the fact that, as we held, the separation was consensual, and was without any agreement, express or implied, that the husband should nevertheless maintain her as a separated wife. We held that that did not affect the husband's liability to maintain the child, and, therefore, that he could be held to have neglected to maintain the child. It is plain that this present case falls somewhere between those two extremes. I am not going to repeat what I said in *Starkie* v. *Starkie* (*No. 2*),[4] namely, that I could imagine circumstances, for example, in which the wife had so contracted to live separate and apart as to accept the burden upon herself of maintaining the child and exempting the husband, and that, so long as that arrangement stood, it could, as I think, exonerate him from a charge of wilful neglect to provide reasonable maintenance for the child. But I need not go into that sort of detail.

The present case is not directly covered by *Starkie* v. *Starkie* (*No. 2*),[5] but, I think, falls nearer the circumstances that we were dealing with in that case than it does to the other extreme, where there is an actual finding of adultery. Without going into the reasoning in that case, I am content to accept for the purposes of the present case, and to apply to the circumstances of this case, the conclusion at which I arrived where I said[6]: "In "this case the justices have found that from the moment of this "parting the husband never paid a penny in respect of this child. "I cannot see that he has ever given any sort of excuse or "explanation for that, except the suggestion that the child was "not his, which has not been determined in his favour. In my "opinion, therefore, the fact that the wife cannot make out a "case of wilful neglect to provide reasonable maintenance for "herself does not bar her from proving that there has been wilful

[3] [1954] 1 W.L.R. 98.
[4] Ibid.
[5] Ibid.
[6] Ibid. 106.

" neglect to provide reasonable maintenance for the child, and I " think that the justices were quite entitled to find that complaint " proved; and I think that is the right conclusion in this case. . . ."

I am content to apply the reasoning on which that conclusion was based to the present case of reasonable belief in adultery. It was decided, as the magistrates realised, in *Chilton* v. *Chilton*,[7] that this defence applies equally to wilful neglect to provide reasonable maintenance for the wife as it does to the complaint of desertion of a wife. But I do not think that there is any reason why that should exonerate the husband from liability to maintain the child. I was impressed by Mr. Reeve's argument that it is a condition precedent in the case of wilful neglect to provide maintenance for a child that the husband is legally liable to maintain the child. Those words are not included in connection with a charge of wilful neglect to provide reasonable maintenance for a wife, and I think that they do mark a very considerable distinction between the case of the wife and the case of the child, although, as I said at the beginning of this judgment, it may be academic in view of the broader issue whether this child is in truth a " child of the marriage " at all. I am prepared to hold that apart from that, there is no impediment to the wife securing an order in respect of wilful neglect to maintain the child simply because she has induced in the husband a reasonable belief that she has committed adultery with Brindley, which, as has been rightly held, is an answer both to her charge of desertion, and of wilful neglect to maintain herself.

That brings me to this other graver matter. This issue has never been decided by the magistrates, and I do not think it would be right for us, in the circumstances, particularly in the light of the information which we have been given as to the evidence which may be available, to attempt to decide the major question whether this child is a child of the marriage. It has been suggested that we ought to deal with this case on the basis of rule 73 (7) of the Matrimonial Causes Rules, 1957, and draw any inference which the magistrates could have drawn. It is said that, although there was a faint-hearted suggestion that the husband was not the father of the child, that was never brought to a point, and on the evidence as it stands we ought to draw the only inference which could be drawn from the evidence as it was presented to the magistrates, namely, that everything is in order so far as this child is concerned. There is also invoked the principle upon

[7] [1952] P. 196.

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which fresh evidence is admitted in the Court of Appeal with a view to obtaining a new trial, the strictness of which was emphasised by the Court of Appeal in the case of *Corbett* v. *Corbett*.[8] I am referring particularly to the judgment of Evershed M.R., and to the approval of that case in *Andrew* v. *Andrew*,[9] the point in both cases being that the rule applies in all its strictness even to matrimonial causes, and in spite of the interest which the public has in the sanctity of marriage and the obtaining of divorce only on just and proper grounds. It is right to notice, as Mr. Tucker pointed out to us, that in that context great stress is laid upon the existence of the office of the Queen's Proctor in connection with divorce cases, a precaution which, of course, is not available in a case like this on an appeal from magistrates. To that extent, therefore, that particular safeguard is not in question here, and the suggestion is that we should be more careful in considering whether it is not a case within the class of exceptions to which the Master of the Rolls drew attention.

I am inclined to think that the rule about fresh evidence is not really the governing rule in this case. I think that the true position is that this is a case in which the real issue has never been determined by the court below. The separate issue of neglect to provide reasonable maintenance for the child has never been dealt with at all, and, therefore, as we think this is a case in which there ought to be a rehearing of that issue, with such guidance as our judgments can give the magistrates on that occasion, it will be open to the parties to raise everything which can be raised upon that issue. Plainly, if that is so, the question whether the child is a " child of the marriage " is one of the essential issues to be dealt with. That is the principle that we ought to apply here. We ought to send the whole case back for the issue of neglect to maintain the child to be dealt with by a fresh panel of magistrates, including, amongst other things, the cardinal issue whether the child in question is a child of the marriage.

I would only add that I think it will be a point for the magistrates to consider whether, as this is an important matter from the point of view of the child, they should not take steps to ensure that the child is separately represented. In saying that, I am following the indication which Phillimore J. and I recently gave in *Francis* v. *Francis*,[10] that if we were going to decide this issue

[8] [1953] P. 205; [1953] 2 W.L.R. 1124; [1953] 2 All E.R. 69, C.A.

[9] [1953] 1 W.L.R. 1453, P.C.

[10] [1960] P. 17; [1959] 3 W.L.R. 447; [1959] 3 All E.R. 206, D.C.

in that case we should certainly take steps to see that the child was separately represented.

I think, therefore, that we should allow the appeal, and order a rehearing on the lines I have suggested.

MARSHALL J. I agree, and would add my word of gratitude for the clear and helpful arguments of counsel on both sides.

The magistrates dismissed a summons brought by the wife alleging that her husband had deserted her on September 28, 1959, and also that he had been guilty of wilful neglect to provide reasonable maintenance for her and her child. The summons was issued under section 4 of the Summary Jurisdiction (Married Women) Act, 1895, which enables a wife to seek at the hands of the magistrates an order for maintenance where, inter alia, the husband has been guilty of desertion or, alternatively, of wilful neglect to provide reasonable maintenance for her or her infant children. I think it is proper to stress the presence of the word "or" in that section, but though the summons appears to set forth only two complaints, in fact the more accurate way of expressing the actual claim made by the wife would be to set out three, namely, (1) desertion of the wife, (2) wilful neglect to provide reasonable maintenance for the wife, and (3) wilful neglect to provide reasonable maintenance for her infant child.

The magistrates heard the case and dismissed all complaints in the summons, and the wife now appeals, seeking from us an order that they were wrong, in particular in dismissing the summons in so far as it alleged wilful neglect to provide reasonable maintenance for her infant child.

Mr. Trevor Reeve, who appears for the appellant, has put before us two main grounds of appeal. In the first place, he says that the magistrates were wrong to dismiss the summons for wilful neglect to provide reasonable maintenance for the child on the ground that the husband had a reasonable belief, at the time he left his wife, in her having committed adultery; his second point involves the proposition that the magistrates, having regard to the course which this case took before them, did not consider the complaint of the wife that the husband had wilfully neglected to provide reasonable maintenance for the child.

[His Lordship referred to the facts and continued:] The first point, therefore, is to consider whether the fact that the magistrates were satisfied that the wife, by her conduct, had induced the belief in her adultery, was good ground for dismissing not only

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the complaints of desertion and wilful neglect to provide reasonable maintenance for the wife, but also for dismissing the complaint of wilful neglect to provide reasonable maintenance for the infant child. On that point I desire to say that I am in entire agreement with Lord Merriman P., and do not propose to refer again to those extracts from the judgment in the case of *Starkie* v. *Starkie* (*No. 2*).[11] By way of reinforcement of what has fallen from my Lord there is an extract from the judgment in *Kinnane* v. *Kinnane* [12] which, in my opinion, helps to resolve this first issue which has been raised. Lord Merriman P. said [13]: "Any sum awarded for the maintenance of the wife, and any "sum ordered to be paid to the wife for the support of the "children is, as it always has been, an order for the wife; and, "speaking generally, any of these orders, as I read the code, can "be made and can only be made, if it is established that one of the "complaints made by her under the code is found to be proved. "In other words, I reject the argument that an order cannot be "made in favour of the wife for maintenance of the wife unless "it is founded on wilful refusal to provide reasonable maintenance for her, or, put the other way, that if the only legitimate "finding is that there has been wilful neglect to provide reasonable maintenance for the infant children whom the husband is "legally liable to maintain, no order for maintenance of the wife "can be made. I do not think that that is the law. It may be "that the amount which justices, or this court, for that matter, "may think reasonable in favour of a wife may depend upon "whether the neglect has been of the wife or of the children or "both, but, in my opinion, the right to make an order is established when once the justices are satisfied that any one of the "complaints set out in section 4 of the Act of 1895 is proved." On the view that I take of section 4, wilful neglect to provide reasonable maintenance for a child is a separate complaint.

By section 6 of the Act of 1895 the fact that the wife has committed adultery is an absolute bar, subject, of course, to matters such as condonation set out therein. I can also see good grounds for saying that where a wife consensually separates from her husband taking a child with her, with an express or an implied agreement that if the child is allowed to remain with her she does not claim any maintenance for herself or the child, such an

[11] [1954] 1 W.L.R. 98.

[12] [1954] P. 41; [1953] 3 W.L.R. 782; [1953] 2 All E.R. 1144, D.C.

[13] [1954] P. 41, 43.

agreement should reasonably be held to debar any claim for maintenance, whether it be for the wife or for the child.

Adultery is a statutory bar. Reasonable belief in the wife having committed adultery does not fall into the category of a statutory bar, and, indeed, I find it difficult, whether it be in reason or in justice, to understand why it should be said that that which properly may be a defence to desertion or failure to maintain a wife, namely, the misconduct of the wife, should prejudice her and cause her to have to keep the child without maintenance from the husband, the husband being in a position legally to maintain the child.

Although *Starkie* v. *Starkie* (*No. 2*)[14] and *Kinnane* v. *Kinnane*[15] are not directly in point, in my judgment they are compelling authority to this court to say that in the circumstances of the present case it would not be right to uphold the decision of the magistrates that the wilful neglect to provide reasonable maintenance for the child was justified.

In those circumstances, in my judgment, the first argument advanced on behalf of the wife by Mr. Trevor Reeve is good, and in the circumstances of this case the fact that the husband did have reasonable ground for believing that the wife had committed adultery provides no answer to her claim, in so far as her claim is based on maintenance for the child.

The second point that arises poses some very difficult questions, and I have come to the conclusion that, as Lord Merriman P. has already stated, the proper course for this court to take is to send this case back for a rehearing. The reasons why I have formed that view are as follows. It is quite plain that there must be a real issue about the paternity of this child. That was only half-heartedly investigated.

The statement of reasons given by the justices ends with the following: "The wife's further complaint (that the husband had "wilfully refused to maintain her) is, in our opinion, related to "the charge of desertion, and following *Chilton* v. *Chilton*,[16] "must stand or fall with it. As we hold the husband not to be "in desertion, it therefore follows that he is not guilty in these "circumstances of wilfully refusing to maintain his wife, and the "second complaint is therefore dismissed." In my judgment, it is impossible from that sentence to avoid the conclusion that the justices first considered the issue of desertion, considered

[14] [1954] 1 W.L.R. 98.
[15] [1954] P. 41.
[16] [1952] P. 196.

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whether there was a defence to that charge, and having come to the conclusion that there was a defence to it they failed to go on to consider upon its merits the question of wilful neglect to maintain, because they believed by the authority of *Chilton* v. *Chilton* [17] the other two complaints must stand or fall with the charge of desertion. I have already stated that, in so far as the complaint sought maintenance for the wife, in my judgment, that was right, but in so far as it sought maintenance of the child it was wrong.

Faced with a situation in which it is quite clear that the justices failed to consider at all, on its merits, the real issue in this charge of wilful neglect to maintain, it would be an extremely unwise thing for this court to seek, on the evidence that is now placed before it, to give any decision on this matter. In my judgment, the just and proper course is to send the case back to be reheard by a fresh panel of justices. At one stage it was suggested that it would be improper to do that because indications had been given to us by Mr. Tucker that there is now fresh evidence available which might vitally affect the issue as to the paternity of the child in question. But Mr. Tucker never asked this court for permission to call fresh evidence. No such application has been made. If it is right to return the case for rehearing, the mere fact that at a second hearing further evidence would be available, albeit evidence that might reasonably have been available at the first hearing, should not, in my judgment, operate to prevent us sending it back to be reheard.

For these reasons I agree with my Lord that this appeal should be allowed, and the case returned to be reheard, upon the conditions that my Lord has set forth.

LORD MERRIMAN P. The appeal will be allowed, and the order dismissing that part of the complaint which relates to wilful neglect to provide reasonable maintenance for the child will be set aside, and that part of the complaint will be remitted for rehearing to a fresh panel of the justices for the petty sessional division.

Appeal allowed.

Solicitors: *Bower, Cotton & Bower for Slater, Heelis & Co., Manchester; Blair & Seddon, Manchester.*

[17] [1952] P. 196.

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1960 *Dec.* 14.

1961 *Jan.* 23.

Lloyd-Jones J.

Husband and Wife — Nullity — Foreign decree — Validity — Voidable marriage—Foreign decree of nullity—Recognised by law of husband's domicile.

The parties were married in 1952 in London. The husband was at all material times domiciled in Italy. The marriage was never consummated, owing to the husband's incapacity. In 1953, the parties finally ceased to cohabit. In September, 1959, when the wife was resident in the Canton of the Grisons, in the Swiss Confederation, and the husband was resident in Italy, the husband had his name removed from the population register of the Commune of San Remo and obtained his inscription in the civil population register of Castaneda, in the Grisons. Later in the same month, the husband instituted proceedings in the Grisons for an annulment of the marriage on the ground of his own impotence. The Swiss court held that since the husband had been struck off the population register of the Commune of San Remo and had obtained inscription in the civil population register of Castaneda, that proved that he resided at Castaneda with the intention of settling down there. It followed that he had proved that he had his "domicile" at Castaneda, and that, accordingly, the court had jurisdiction to adjudicate upon the petition, and it declared the marriage null and void. Less than three months after obtaining the Swiss decree, the husband, being then resident in England, sought a declaration that the Swiss decree was a valid and effective decree annulling the marriage. Expert evidence established that the courts of Italy would recognise the Swiss decree as valid:—

Held, that the principle that the English courts will recognise as valid a decree of divorce obtained in a State where the husband was not domiciled, if the courts of his domicile would recognise the validity of the decree, applies also to nullity decrees.

Armitage v. *Attorney-General* [1906] P. 135; 22 T.L.R. 306 applied.

Undefended petition for a declaration.

On October 19, 1952, the husband, who was at all material times domiciled in Italy, married the wife at the Church of St. James, Spanish Place, in London. Before the marriage the wife was domiciled in England.

After the marriage, the parties never cohabited in England. The marriage was never consummated, but on June 23, 1953, the wife gave birth to a child, Michael, who was conceived by fecundatio ab extra.

[Reported by D. R. Ellison, Esq., Barrister-at-Law.]

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Soon after the birth of the child, the marriage broke down completely and the parties, who had cohabited in Italy, thereafter lived apart.

In September, 1959, the husband had his name removed from the population register of the Commune of San Remo, where he had until then resided, and obtained his inscription in the civil population register of Castaneda, in the Canton of the Grisons, in the Swiss Confederation. The wife was at that time resident at Castaneda. Later in September, 1959, the husband initiated proceedings for the annulment of the marriage before the "Tribunale" for the District of Moesa, in the Canton of the Grisons, and on July 9, 1960, that court declared the marriage to be annulled. The judgment of the court contained the following recitals and findings. The husband's petition, dated October 15, 1959, was on the ground of his own impotence. At the hearing of the petition on July 9, 1960, both parties appeared and were legally represented. The wife admitted all the allegations set out by the husband in his petition, and supported the petition. The marriage had never been consummated owing to the husband's impotence, which impotence existed before the marriage and was permanent. Article 136 in conjunction with article 144 of the Swiss Civil Code prescribed that the court having jurisdiction to adjudicate upon petitions for divorce and annulment of marriage was the court of the "domicile" of the petitioner. By the Swiss Civil Code, the domicile of a person is the place where that person resides, if it is proved that he or she has given up his or her domicile abroad without having established another in Switzerland. By article 1 of the Convention of January 3, 1933, between Italy and Switzerland, judicial decisions in matters of civil law given by the courts of one of the contracting parties have binding force in the other country if the decision emanates from a court having jurisdiction in accordance with article 2 of the Convention, which prescribes, among other things, that such jurisdiction exists when the respondent has his or her domicile at the place where the decision is applied for, or when he or she has pleaded without reservation on the main issue of the dispute. In the present case, the husband petitioner had proved that he had his domicile at Castaneda, within the jurisdiction of the court, since it appeared that he had been struck off the population register of the Commune of San Remo, where he used to reside, and had obtained inscription in the civil population register of Castaneda. It had therefore been proved that the husband resided at

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Castaneda with the intention of settling down there, so that both the domestic and the international jurisdiction of the court appeared to be indisputable. The court declared the marriage null and void.

By his petition dated October 21, 1960, the husband, being then resident in England, sought a declaration that the Swiss decree pronounced on July 30, 1960, was a valid and effective decree annulling the marriage.

An expert in Italian law gave evidence that the Swiss decree would be recognised by the courts in Italy as validly annulling the marriage, since that decree complied with the requirements of the Convention of January 3, 1933, between Italy and Switzerland.

Joseph Jackson for the husband. It is conceded that the husband's residence in England is merely temporary. The fact that the marriage ceremony took place in England confers jurisdiction to grant the declaration sought. Alternatively, on the annulment of the marriage by the Swiss court, the wife is to be presumed to have reverted to her English domicile.

At the time of the Swiss proceedings both parties were resident in the Canton of the Grisons. The Swiss court, therefore, had jurisdiction, in the eyes of English law, to annul the marriage. [*Mitford* v. *Mitford and Von Kuhlmann* [1] was referred to.] The main ground relied on to support the validity of the Swiss decree is that at the time of the Swiss proceedings both parties were domiciled in Italy, and the evidence has established that the Italian courts would recognise the Swiss decree; the English courts should therefore recognise it, on an application, by analogy, to foreign nullity decrees of the principle established in *Armitage* v. *Attorney-General* [2] in regard to the recognition of foreign decrees of divorce.

Cur. adv. vult.

Jan. 23. LLOYD-JONES J. read the following judgment, in which he stated the facts and continued: In September, 1959, the husband initiated proceedings in Switzerland before the Tribunal of the District of Moesa in the Canton of the Grisons, for the annulment of his marriage. On July 9, 1960, that court declared the marriage to be annulled. The judgment of the Swiss court has been proved before me.

[1] [1923] P. 130; 39 T.L.R. 350. [2] [1906] P. 135; 22 T.L.R. 306.

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It is submitted in this court that there are three approaches to the recognition of the Swiss judgment. First, it is said there is a possibility that the husband was domiciled in the Canton of the Grisons at the time of the proceedings, as stated in the Swiss judgment; but, in fact, no reliance was based on this possibility, for from an English point of view it is patent on the evidence that no domicile of choice was acquired there.

Secondly, it is said that the husband was at all material times domiciled in Italy, that the courts of Italy recognise the Swiss decree, and that, on the analogy of the principle in *Armitage* v. *Attorney-General* [1] recognition should be accorded to that decree.

Thirdly, it is said that both the parties were resident in the Canton of the Grisons at the time of the decree, that residence of both parties gives an English court jurisdiction in nullity proceedings: *De Reneville* v. *De Reneville*,[2] and that an English court ought to accord jurisdiction to other courts, on a reciprocal basis, where it itself takes jurisdiction, as indicated in *Travers* v. *Holley*.[3]

I find that the husband, and therefore the wife, was domiciled in Italy at all material times.

Dr. Del Guidice, an expert in Italian law, and Dr. Speckert, an expert in Swiss law, have both given evidence before me, and I am satisfied that the courts of Italy will accord recognition to the Swiss decree. It is not necessary to repeat their reasons for stating this, since the judgment of the Swiss court sets out all the material facts and law.

The first question to be decided is whether the principle established in *Armitage* v. *Attorney-General* [4] should be applied to nullity suits. There appears to be no reported authority on the matter, but textbooks appear to warrant its application: see Dicey's Conflict of Laws, 7th ed., p. 383; Rayden on Divorce, 8th ed., p. 824; Jackson on The Formation and Annulment of Marriage, p. 281.

In my judgment, if the court of the domicile of the parties recognises a nullity decree, this court will recognise it, and I so hold.

The question as to recognition of a decree founded on residence of both parties does not therefore fall to be decided in this case.

[1] [1906] P. 135; 22 T.L.R. 306.
[2] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.
[3] [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794.
[4] [1906] P. 135; 22 T.L.R. 306.

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I declare, therefore, that the decree of the Tribunal of the District of Moesa in the Canton of the Grisons, made on July 30, 1960, is a valid and effective decree annulling the marriage.

Declaration accordingly.

Solicitor: *W. Timothy Donovan.*

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C. A.

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Feb. 13.

Holroyd Pearce, Harman and Davies L.JJ.

Husband and Wife — Maintenance — Divorce — " £200 *per annum less "tax"—Wife owing debt to husband—Order that debt be set off by instalments not exceeding such amount as may be agreed or awarded to wife by way of maintenance—Maintenance order for "* £200 *a year "less tax"—Tax deduction certificates for* £85 *supplied annually by husband to wife—Wife entitled only to set off annual instalments of* £115*—Income Tax Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *s.* 169 (1) (*d*).

Revenue—Income tax—"Free of tax" payments—" £200 *a year less "tax" — Maintenance — Effect of order — Income Tax Act,* 1952, *s.* 169 (1) (*d*).

In 1955 a wife's proceedings concerning a house, under the Married Women's Property Act, 1882, were stayed on terms embodied in a master's order that the wife should buy the property for £610, paying the husband £150 within 28 days, the remainder of £460 "to be set off by instalments not exceeding such amount "as may be agreed or awarded" to the wife "by way of alimony "and/or maintenance." The wife paid the £150 within 28 days. Later she obtained a divorce and an order for maintenance at the rate of "£200 a year less tax." Thereafter, the husband gave the wife tax deduction certificates for £85 each year (that being the tax on £200 at the standard rate) and credited her with £115 a year against the debt of £460. The wife used the certificates to obtain reimbursements of tax. In March, 1960, the wife claimed arrears of maintenance from the husband, contending that the amount to be set off against her debt was £200 a year and that, on that basis, she had discharged it. The husband contended that the amount to be credited to her was only £115 a year, namely, "£200 a "year less tax." The trial judge held that the wife was entitled to a set-off of £200 a year, and gave judgment for her. The husband did not pay, and on a summons by the wife for his commitment, the judge made an order for his commitment, but suspended it, giving him leave to appeal. On appeal by the husband:—

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Held, that "the amount awarded to the wife" in the master's order incorporating the parties' bargain meant the amount which the husband would have to pay in cash each year to the wife, and under a maintenance order for "£200 less tax" that amount was, by virtue of section 169 (1) (*d*) of the Income Tax Act, 1952,[1] £115, so that on payment of £115 to the wife and the balance of £85 to the Revenue, the husband was thereby acquitted and discharged of the £85 representing the deduction. Accordingly, the wife could only set off against her debt the sum of £115 each year; there were no arrears of maintenance owing; and the suspended order for commitment against the husband must be discharged.

Taylor v. *Taylor* [1938] 1 K.B. 320; 53 T.L.R. 942; [1937] 3 All E.R. 571, C.A. distinguished.

Decision of Collingwood J. reversed.

APPEAL from Collingwood J.

In 1953 a wife started proceedings against her husband (who had left her in 1952) under section 17 of the Married Women's Property Act, 1882, in respect of a house, the matrimonial home. In June, 1955, those proceedings were stayed on terms incorporated in a master's order that the wife should purchase the husband's interest in the property for £610 to be paid as to £150 within 28 days and as to the balance of £460 to be set off by instalments not exceeding such amount as might be agreed or awarded to the wife by way of alimony and/or maintenance. The £150 was duly paid by the wife within the time specified, leaving a balance of £460 due to the husband. On March 20, 1956 (three years after the husband had deserted her), the wife filed a petition in divorce and on May 15 a decree nisi was granted and that was made absolute on July 3, 1956. On July 3, 1957, an order for maintenance was made in her favour for £200 per annum less tax payable monthly.

Thereafter the husband made no payments to the wife under the order for maintenance but he supplied her each year with tax deduction certificates which showed that £85 had been deducted from his income, representing tax at the current standard rate on £200. The wife used those certificates to obtain reimbursements of almost the whole amount.

In 1960 the wife took out a summons under the Debtors Act

[1] Income Tax Act, 1952, s. 169 (1): "Where any yearly interest of "money, annuity or other annual "payment is payable wholly out of "profits or gains brought into charge "to tax— . . . (*d*) the person to "whom the payment is made shall "allow the deduction on receipt of "the residue of the payment, and "the person making the deduction "shall be acquitted and discharged "of so much money as is represented "by the deduction, as if that sum "had been actually paid."

(Matrimonial Causes) Jurisdiction Order, 1932, claiming arrears of maintenance under the order of July, 1957. It was contended on her behalf, as a preliminary point, that under the order she was entitled to credit at the rate of £200 a year against the debt of £460 and that accordingly she had discharged her liability and there was owing by the husband the sum of £241 7s. 5d. arrears of maintenance. For the husband it was contended that only £115 per annum should be credited, namely, £200 less £85 tax, and that the result of that was that the debt of £460 had not yet been paid.

Collingwood J. on March 28, 1960, giving a reserved judgment, said: "The order is for £200 a year, and whether the "order is less tax or silent as to tax the result is the same. "The husband is entitled, in making the payment, to deduct "from it the amount representing the tax thereon at the standard "rate for the year and he is entitled to be acquitted and discharged of so much money as is represented by the deduction "as if that sum had actually been paid. The husband is merely "acting as agent for the Inland Revenue in making this deduction. The amount awarded to the applicant by way of maintenance is therefore £200 per annum and that is the amount "which is to be credited against the balance of £460 due from "the wife."

The husband did not pay the arrears, and on the wife's summons that he should be committed to prison Collingwood J., on July 18, 1960, made a suspended commitment order under rule 6 (2) of the Judgment Summons Rules, 1952, but giving leave to the husband to appeal. The husband appealed.

Frank J. White for the husband. First, the words "£200 "per annum less tax" in the maintenance order limit the liability of the husband to paying £115 to the wife and £85 to the Inland Revenue, and the wife is bound to give credit for the tax paid, since under the Income Tax Act, 1952, s. 506 (2), an agreement to give credit for £200 a year without deducting tax is void. If there are two constructions of the master's order embodying the agreement, the court must accept that construction which does not offend against the statute. If the judge's construction is accepted, this wife is getting £285 a year. The wife agreed to pay off by instalments to the husband the sum of maintenance ordered to be paid by him, and it is therefore necessary to determine what the husband was ordered to pay his wife.

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Secondly, whatever was agreed, the husband had a statutory right under section 169 (1) (*d*) of the Income Tax Act, 1952, to deduct the tax from the credit he was giving the wife on her debt; and having made the deduction he was thereby acquitted and discharged of that amount. He also did all that was necessary to be done by obtaining the tax deduction certificates and handing them over to the wife so that he can set off the tax he has deducted in the relevant year. *Taylor* v. *Taylor* [2] is distinguishable, for there the husband paid the wife the full amount without deducting tax and then found that under the Act he was unable to set off the tax which he had not deducted. [*Hemsworth* v. *Hemsworth* [3] was also distinguished.]

Thirdly, this wife took advantage of the Act because she claimed by means of the tax deduction certificates whatever benefit she was entitled to claim, and cannot now be heard to say that the Act should not apply as between herself and the husband. She is also bound under the Act to give credit for those sums, and there is a penalty provision if she does not do so: section 506 (1).

Fourthly, if the master's order amounted to and is to be read as an agreement by the husband to give credit for the full £200 without deduction of tax, that is an agreement which offends against section 506 (2) of the Act of 1952 and is void. It should be construed as a sum which gives credit for the tax, for that would be in accordance with the Act.

John Gardner for the wife. First, the master's order must be read as it stands and means that no cash shall pass from wife to husband while the debt is outstanding but that the cash which would have passed under a maintenance order should remain in his hands as a set-off.

Secondly, the order for maintenance made in the Divorce Division is an order to pay the wife £200, and that is the amount which the husband takes from his income each year to pay his wife. Although he is allowed under the Act of 1952 to deduct the tax, the words "less tax" were not necessary. If the order is not read as an order to pay the wife £200 it could lead to complicated situations. The registrar making maintenance orders does not normally take into account the fact that the husband, instead of paying £200, would, in this case, be paying £115. It so happens that this wife is in humble circumstances and so

[2] [1938] 1 K.B. 320; 53 T.L.R. 942; [1937] 3 All E.R. 571.

[3] [1946] K.B. 431; 62 T.L.R. 329; [1946] 2 All E.R. 117.

receives back all but £4 of the £85 tax deducted; but if she had been paying tax at the full standard rate, she would have got nothing back from the Revenue; and similarly if the husband were in the surtax bracket he would benefit by this order, for, instead of paying in respect of £200 a year at the ordinary rate of tax plus surtax, he would pay only £85 at the standard rate current for the time being. Because of those possible difficulties the order must be read strictly as an order for £200 a year, being a payment assessed in the Divorce Division which may fluctuate from year to year as it is paid, because tax may vary from year to year, but the order itself remains constant and is for £200 a year. It is conceded that *Taylor's* case [4] is against the present submission, for Greer L.J. there said that the husband in making a payment "under the agreement" was entitled to deduct tax.

White was not called on to reply.

HOLROYD PEARCE L.J. stated the facts set out above and continued: The question here is: Can the wife each year set off against the debt she owes £200, or only £115, being so much of the £200 as would be paid to her after the deduction by the husband of £85 tax each year? The husband duly supplied the wife with tax deduction certificates showing that £85 had been deducted, and the wife used those certificates in order to obtain a reimbursement of tax.

The situation under the Income Tax Act, 1952, with regard to deductions of tax is this. By section 169 (1): "Where any yearly "interest of money, annuity or other annual payment is payable "wholly out of profits or gains brought into charge to tax . . . "(*d*) the person to whom the payment is made shall allow the "deduction on receipt of the residue of the payment, and the per- "son making the deduction shall be acquitted and discharged of so "much money as is represented by the deduction, as if that sum "had been actually paid." Therefore each year out of the £200, which was to be paid to the wife, the wife had to allow the husband £85 deduction, and the husband was discharged of the liability to her in respect of the £85 so deducted.

Section 221 reads: "A claimant shall not be entitled to relief "under the preceding provisions of this Part of this Act in respect "of any income the tax on which he is entitled to charge against "any other person, or to deduct, retain or satisfy out of any "payment which he is liable to make to any other person." That

[4] [1938] 1 K.B. 320, 333.

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section shows that whatever the tax position of the husband, he cannot get any benefit from the £85 which he deducts.

Now as the husband duly gave the tax certificates purporting to make the tax deductions at the time when the money would (apart from the set-off) have been due, no such difficulty arises in his way as arose in *Taylor* v. *Taylor*.[1] The judge held the view that the contentions of the wife were correct, and that she was entitled each year to have a set-off of £200 under this order. He said: "In my opinion the contention on the part of the wife "is the correct one. The order is for £200 a year, and whether "the order is less tax or is silent as to tax the result is the "same; the husband is entitled, in making the payment, to "deduct from it the amount representing the tax thereon at the "standard rate for the year and he is entitled to be acquitted "and discharged of so much money as is represented by the "deduction as if that sum had actually been paid. The husband "is merely acting as agent for the Inland Revenue in making "this deduction. The amount awarded to the applicant by way "of maintenance is therefore £200 per annum and that is the "amount which is to be credited against the balance of £460 due "from the wife."

With all respect to the judge I find myself unable to take that view of the matter. In interpreting the words of the maintenance order for this purpose—"£200 less tax"—one must read it as saying that the liability of the husband in respect of actual payments to the wife in any year was limited to £115. The balance of £85 he had to pay to the Revenue. So long as he did not fail to pay the wife sums amounting in the year to £115 he could not be brought up before the court, nor could it be suggested that he was failing to comply with this order. It is impossible in my view to arrive at the judge's conclusion without ignoring the words "less tax" which occur in the order. The annual payment less tax is £115. One cannot ignore the provision of section 169, the effect of which is that an annual order of £200 less tax is discharged by paying only £115 to the wife and £85 to the Revenue. Moreover, I think that the only reasonable construction of clause 3 in the master's order is that the words "amount awarded to the wife" mean the amount which under any order the husband will have to pay in cash to the wife, and do not include any deductions which he must pay to the Revenue. So read, the bargain made between the parties on which the

[1] [1938] 1 K.B. 320; 53 T.L.R. 942; [1937] 3 All E.R. 571, C.A.

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order is founded is sensible and just and in accordance with the Income Tax Acts. In my view the wife is not entitled to any larger set-off than the annual amount of £115 under this order. The result of that is that there are no arrears of maintenance, and the committal order must be discharged.

HARMAN L.J. I agree. The amount payable by the husband to the wife under the Divorce Court order is not in doubt. The only doubt arises from the fact that the wife is his debtor, and the question is how much she is entitled to be released from her debt by reason of the Divorce Court order. When one works it out it seems clear that she cannot be relieved of her debt at the rate of £200 a year when in fact her husband does not owe her that sum. He owes her £115, and £85 to the Revenue. She is no worse off, because, owing to the rate of her income, she gets back practically the whole of the £85 from the Inland Revenue. I do not see why she should be entitled in that way to obtain credit against the sum which she owes to her husband, and then move to commit him when she still owes him money. In my judgment the confusion here has risen because of the odd kind of set-off which exists under the order of the Queen's Bench Division. My Lord has put the position clearly, and I agree with him.

DAVIES L.J. I also agree.

Appeal allowed. Suspended commitment order discharged.
No order as to costs.

Solicitors: *Gamlen, Bowerman & Forward for Lovegrove & Durant, Windsor; Cartwright, Cunningham for T. W. Stuchbery & Son, Windsor.*

M. M. H.

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June 16,
17, 24.
Karminski J.

Husband and Wife—Nullity—Jurisdiction—Marriage celebrated in jurisdiction—Husband resident and domiciled in Scotland—Jurisdiction of English court to annul void or voidable marriages where husband neither domiciled nor resident in jurisdiction.

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Nov. 18, 21, 22;
Dec. 20.

Ormerod, Willmer and Upjohn L.JJ.

Judicial Precedent—Court of Appeal decision—Conflicting Court of Appeal decision—Jurisdiction to follow later of the two conflicting decisions.

A wife petitioned for a decree of nullity on the ground of the husband's incapacity or, alternatively, his wilful refusal to consummate the marriage. The marriage had been celebrated in England. At the time of the institution of the suit, the wife was resident in England, but the husband was not, and was at all material times domiciled in Scotland. On an issue as to whether the court had jurisdiction to hear the suit, Karminski J. held that the court did not have jurisdiction. On the wife's appeal:—

Held, that jurisdiction existed to entertain a suit for nullity of any class whenever it was shown that the marriage was celebrated in England; accordingly, as the present marriage had been celebrated in England the court had jurisdiction to pronounce on its validity, and to inquire into both the grounds on which its validity was impugned.

Ramsay-Fairfax (*orse. Scott-Gibson*) v. *Ramsay-Fairfax* [1956] P. 115; [1955] 3 W.L.R. 849; [1955] 3 All E.R. 695, C.A. and *Addison* (*orse. MacAllister*) v. *Addison* [1955] N.I. 1 applied.

Casey v. *Casey* [1949] P. 420; 65 T.L.R. 528; [1949] 2 All E.R. 110, C.A. not followed.

Hill (*orse. Petchey*) v. *Hill* [1960] P. 130; [1959] 3 W.L.R. 828; [1959] 3 All E.R. 754 overruled.

Decision of Karminski J., post, p. 41; [1960] 3 W.L.R. 753; [1960] 3 All E.R. 70 reversed.

ISSUE.

The parties were married on July 8, 1955, at Newcastle-upon-Tyne. On October 19, 1959, the wife presented a petition for nullity of marriage on the ground of wilful refusal by the husband to consummate the marriage and, in the alternative, on the ground of the husband's incapacity. The petition alleged that the wife was resident in England, that the husband was resident in Kuwait, and that the parties were domiciled in England. By his answer dated April 7, 1960, the husband alleged that he was then resident in Scotland and that he was, at all material times, domiciled in that country. An issue was directed to be tried to determine whether the court had jurisdiction to determine the suit, by reason either of the domicile of the parties or of the fact that the marriage was celebrated in England.

F. S. Laskey for the husband.

S. K. D'A. De Ferrars for the wife.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

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June 24. KARMINSKI J. read the following judgment: On October 19, 1959, the wife presented a petition to this court praying that the marriage in fact celebrated between her and the husband on July 8, 1955, be declared null and void. Her petition is based on the ground of wilful refusal by the husband, and, in the alternative, on the ground of his incapacity to consummate the marriage. The petition further alleges that at the time of its presentation the wife was living in England and the husband in Kuwait and that both the wife and the husband were domiciled in England. The husband, by his answer dated April 7, 1960, denied that the marriage had never been consummated, or that he had refused to consummate it, or that he was at any time incapable of consummation. The husband further alleged that he was at all times domiciled in Scotland and he asserted that at the time of the presentation of his answer he was resident in that country. On these pleadings an issue was directed to be tried to determine whether this court has jurisdiction in the suit, by reason either of the domicile of the parties or the place where the ceremony of marriage was celebrated, namely, Newcastle-upon-Tyne.

The marriage between the parties was in fact celebrated on July 8, 1955, at the register office in the district of Newcastle-upon-Tyne. On the evidence before me I have had no difficulty at all in coming to the conclusion that the domicile of the husband, who is the plaintiff in the present issue, is and always has been Scottish. The husband was born at Kilmarnock in Ayrshire; his father's domicile at the time of his birth was Scottish, and the husband's domicile of origin was also Scottish. For the most part his working life in the oil industry has required him to live in the Persian Gulf. For a relatively short period his work required him to live in England, and indeed he was working at Newcastle when he married his wife. It is also true that for a period of about one year, when he was working in Kuwait at a time when the wife and her child did not accompany him there, he leased for her a cottage in Sussex for a term of one year. I am satisfied on the evidence that he has never in fact abandoned his domicile of origin in Scotland, and has never formed any intention of so doing or of acquiring a domicile of choice in England. I find him, therefore, to have been, at the time of the institution of this suit, domiciled in Scotland, and, indeed, still to be domiciled there.

As the husband, at the time the petition was presented, was neither domiciled in England nor resident here, the jurisdiction of the English courts cannot be invoked on the grounds of either

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domicile or residence. I have no doubt that if the husband had been domiciled in England at the material time the courts of this country would have had jurisdiction to entertain this suit. Further, I have equally no doubt that the courts of this country would have had jurisdiction if the husband had been resident here at the time of the institution of this suit, notwithstanding the fact that he was then domiciled in Scotland. The point which falls for decision on this issue is whether or not, in a suit for nullity based on the grounds either of wilful refusal or of incapacity, the English courts have jurisdiction to entertain the suit on the ground that the marriage was in fact celebrated in England.

Thus stated the problem sounds simple enough, and might be expected to have been fully covered by judicial authority. But on examination the problem has turned out to be far more difficult than anticipated, and the difficulties have been increased by some marked divergences of judicial opinion. There is a long line of authority which has held that the courts of the country where the ceremony was performed has jurisdiction to determine the validity of the marriage. The authorities in support of this proposition have been recently very fully considered by Collingwood J. in *Hill (orse. Petchey)* v. *Hill*,[1] and I do not therefore propose to discuss them at length. In *Simonin (falsely called Mallac)* v. *Mallac* [2] the parties were domiciled and resident in France and the ceremony of marriage was in England. By the law of their domicile certain consents were required, but were not in fact obtained. Assuming jurisdiction, Sir Cresswell Cresswell, the Judge Ordinary, said [3]: "the parties, by pro- "fessing to enter into a contract in England, mutually gave to "each other the right to have the force and effect of that contract "determined by an English tribunal." In *Sottomayor* v. *De Barros* [4] the parties were domiciled in Portugal, and, at the time of the institution of the suit, resident there. They were in fact first cousins and so unable to intermarry by Portuguese law. No doubt was entertained either by Phillimore J. or by the Court of Appeal as to the jurisdiction of the English courts. In *Linke (orse. Van Aerde)* v. *Van Aerde* [5] the parties were married in England but domiciled abroad. The petition was for nullity on the ground of bigamy, and jurisdiction was assumed by the English courts on the ground that the marriage was celebrated

[1] [1960] P. 130; [1959] 3 W.L.R. 828; [1959] 3 All E.R. 754.
[2] (1860) 2 Sw. & Tr. 67.
[3] Ibid. 75.
[4] (1877) 2 P.D. 81; 3 P.D. 1, C.A.
[5] (1894) 10 T.L.R. 426.

in this country. Where the petition for nullity is based on any cause which would render the marriage void ab initio, I entertain no doubt that the court of the lex loci celebrationis has jurisdiction to try the suit. But I have to decide whether the jurisdiction exists also in a case on the present facts, where the grounds of complaint are incapacity or wilful refusal.

On this question four recent decisions fall to be considered, and it is at this point that my difficulties commence. In *Casey* v. *Casey* [6] the Court of Appeal had to consider a petition for nullity based on wilful refusal only. At the time of the filing of the petition, the parties were domiciled in a province in Canada where the respondent husband also resided. The marriage had been celebrated in England, and the court was asked to assume jurisdiction on this ground. Both the trial judge and the Court of Appeal decided that there was no jurisdiction in the English courts. The decision of the Court of Appeal was reached on different grounds; Bucknill L.J. (with whom Cohen L.J. expressly agreed) based his decision partly on the balance of hardship to the parties, but mainly on the analogy of the rule that the court of the domicile of the husband is the sole court which can dissolve a valid marriage, and that a similar rule should be applied to a marriage which is voidable on the ground of wilful refusal. In reaching this decision Bucknill L.J. was following the view formed by Bateson J. in *Inverclyde* v. *Inverclyde*,[7] where the ground for nullity was incapacity. But *Inverclyde* v. *Inverclyde* [7] has since been expressly overruled by the Court of Appeal in *Ramsay-Fairfax* (*orse. Scott-Gibson*) v. *Ramsay-Fairfax*.[8]

Somervell L.J., however, reached his conclusion in *Casey* v. *Casey* [9] by a wholly different route, holding that where the validity of the ceremony was not attacked there seemed to be no ground in principle for giving jurisdiction to the court of the country of the ceremony. He put his view in these words [10]: "The mere "fact that the ceremony of marriage took place in a country does "not seem to me a ground for founding jurisdiction in cases "where the matters alleged in the petition do not in any way "dispute the validity of the ceremony as effecting a marriage." In 1955 *Casey* v. *Casey* [11] was considered in Northern Ireland by

[6] [1949] P. 420; 65 T.L.R. 528; [1949] 2 All E.R. 110.
[7] [1931] P. 29; 47 T.L.R. 140.
[8] [1956] P. 115; [1955] 3 W.L.R. 188 & 849; [1955] 3 All E.R. 695.
[9] [1949] P. 420.
[10] Ibid. 433.
[11] [1949] P. 420.

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Lord MacDermott C.J. in *Addison (orse. McAllister)* v. *Addison*.[12] In that case the wife, who was resident in Northern Ireland, petitioned for a decree of nullity on the grounds of impotence or wilful refusal. The husband was domiciled and resident in England, but the marriage was celebrated in Northern Ireland. Lord MacDermott held that the courts of Northern Ireland had jurisdiction by reason of the fact that the marriage was celebrated in that country, and pronounced a decree on the grounds of incapacity. Lord MacDermott held that *Inverclyde* v. *Inverclyde* [13] was wrongly decided (a view followed by our own Court of Appeal in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [14] later the same year) and therefore refused to follow the view expressed by Bucknill L.J. in *Casey* v. *Casey*.[15] Lord MacDermott held that the courts of the lex loci celebrationis have jurisdiction in nullity in the cases both of void and of voidable marriages. He said [16]: "Whether a contracting party is capable in the physical sense of "discharging the obligations of matrimony seems to be so linked "with the nature and quality of those obligations as to be, naturally and aptly, a matter for the lex loci contractus." Finally, he put his conclusion in these words [17]: "There is much to be said "for committing any plea that strikes at the creation of a valid "marriage bond—be it one of bodily or mental or juristic "incapacity or of a failure to observe the requisite formalities—"to the court of the place where the bond was forged. It seems "the natural forum to decide such issues and in practice it will "often be that best versed in the law to be applied."

In *Ramsay-Fairfax* v. *Ramsay-Fairfax* [18] the Court of Appeal had to consider a petition for nullity based on incapacity or wilful refusal. The marriage was celebrated in Egypt, the parties were domiciled in Scotland but resident in England. It was held that the English courts had jurisdiction founded on the residence of the parties, and overruled *Inverclyde* v. *Inverclyde*.[19] I need refer only to the concluding words of Denning L.J.[20]: "It may "be in these nullity cases that the courts of the domicile also "have jurisdiction: so may the courts of the place where the "marriage was celebrated: but the courts where both parties "reside certainly have jurisdiction." Neither Hodson L.J. nor Morris L.J. expressed any view on the jurisdiction of the court of the lex loci celebrationis.

[12] [1955] N.I. 1.
[13] [1931] P. 29.
[14] [1956] P. 126.
[15] [1949] P. 420, 431.
[16] [1955] N.I. 1, 30.
[17] Ibid. 32.
[18] [1956] P. 115.
[19] [1931] P. 29.
[20] [1956] P. 126, 134.

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The last case to be considered is *Hill* (*orse. Petchey*) v. *Hill*.[21] This was a wife's petition for nullity on the grounds of incapacity. The husband was domiciled in Scotland and resident there when the suit was instituted, but the marriage had been celebrated in England. After hearing argument for the wife and for the Queen's Proctor, Collingwood J. held that the court of the lex loci celebrationis had jurisdiction where the petition was based on incapacity but doubted whether there was such jurisdiction when the ground was wilful refusal, pointing out that while incapacity was known to the ecclesiastical courts as a ground for a decree of nullity, wilful refusal was first made a ground by statute some 80 years after the Matrimonial Causes Act, 1857.

In the course of his considered judgment Collingwood J. examined the earlier authorities and distinguished *Casey* v. *Casey*[22] on the grounds that that decision should be restricted to the particular facts of that case, namely, that it was based on wilful refusal after the ceremony of marriage and distinguishing that ground from incapacity which, to found a decree of nullity, must exist at the time when the marriage is celebrated and not come into existence as a subsequent defect. Collingwood J. also considered *Addison* v. *Addison*,[23] and accepted at any rate that part of Lord MacDermott's judgment which held that the court of the place where the marriage was celebrated had jurisdiction where the petition was based on incapacity.

Like Collingwood J., I have been profoundly impressed by the reasoning of Lord MacDermott in *Addison* v. *Addison*.[23] Indeed, had the matter been free from English authority, I would myself have been very ready to follow that decision. But unlike Collingwood J. I have found myself on reflection unable to distinguish *Casey* v. *Casey*,[24] though I appreciate that that case was based on wilful refusal only. In my view the tests set out by Somervell L.J., and referred to above, state the English law as applicable to suits for nullity based on incapacity or wilful refusal. Though I appreciate that Bucknill and Cohen L.JJ. followed quite different lines of reasoning, I propose to follow Somervell L.J.'s view that the mere fact that the ceremony of marriage took place in England does not confer jurisdiction on our courts unless the validity of the ceremony in effecting a marriage is disputed. Capacity to consummate the marriage is an essential

[21] [1960] P. 130; [1959] 3 W.L.R. 828.

[22] [1949] P. 420.

[23] [1955] N.I. 1.

[24] [1949] P. 420.

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part of the marriage contract, but in my view cannot be said to affect the validity of the ceremony. Wilful refusal to consummate is even more remote from the validity of the ceremony. In the result, therefore, I find that this court has no jurisdiction to try this suit, either on the domicile of the parties or as the court of the place where the marriage was celebrated.

I have differed in this matter from Collingwood J. with hesitation and reluctance and with a full awareness that he may be right and that I may be wrong. Nearly two centuries ago, in *Evans* v. *Evans*,[25] Sir William Scott (the greatest of all consistorial lawyers) said: "if . . . I should have taken what may be "deemed an undue impression of the case, the laws of this "country have not been deficient in providing a mode by which "the parties may be relieved against the infirmities of my "judgment."

Order accordingly.

The wife appealed.

[Reported by D. R. ELLISON, Barrister-at-Law.]

J. B. Latey Q.C. and *S. K. D'A. De Ferrars* for the appellant wife. In deciding questions of jurisdiction no distinction was ever made between void and voidable marriages, either by the ecclesiastical courts prior to 1857, or by the divorce court thereafter, until Bateson J. did so in *Inverclyde* (*orse. Tripp*) v. *Inverclyde*,[1] basing himself on a dictum of Lord Phillimore in *Salvesen or Von Lorang* v. *Austrian Property Administrator*.[2] In *Casey* v. *Casey*[3] Bucknill and Cohen L.JJ., adopting Bateson J.'s reasoning in *Inverclyde*,[4] held that the fact that the marriage was celebrated in England was not sufficient to confer jurisdiction in a wife's nullity suit. *Inverclyde*[4] was overruled in *Ramsay-Fairfax* (*orse. Scott-Gibbon*) v. *Ramsay-Fairfax*,[5] where the Court of Appeal unanimously decided that for the purposes of jurisdiction there was no distinction between void and voidable marriages, and held that the joint residence of the parties in England conferred jurisdiction, but they expressly left open the point whether the fact that the marriage was celebrated in England was of itself sufficient to confer jurisdiction.

[25] (1790) 1 Hag.Con. 35.

[1] [1931] P. 29; 47 T.L.R. 140.

[2] [1927] A.C. 641; 43 T.L.R. 609, H.L.

[3] [1949] P. 420; 65 T.L.R. 528; [1949] 2 All E.R. 110, C.A.

[4] [1931] P. 29.

[5] [1956] P. 115; [1955] 3 W.L.R. 849; [1955] 3 All E.R. 695, C.A.

Apart from *Inverclyde* [6] and *Casey* [7] the whole weight of judicial authority for 100 years has been in favour of the proposition that for purposes of jurisdiction no valid distinction can be drawn between void and voidable marriages and that the lex loci celebrationis is a basis for jurisdiction in nullity cases. The decisions in *Casey* [8] and *Ramsay-Fairfax* [9] are inconsistent, and therefore the matter is res integra and this court can decide it. If that be right, then for the purposes of jurisdiction no distinction should be drawn between void and voidable marriages. An English court can entertain a petition for nullity when (a) the parties are domiciled here; or (b) where they are both resident here; or (c) where England is the lex loci celebrationis. If the matter is not res integra, then a distinction must be drawn between wilful refusal to consummate a marriage and incapacity; if *Casey* [10] is binding the court of the lex loci celebrationis would not have jurisdiction in the former case but is not precluded in the latter. [Reference was made to Dicey's Conflict of Laws, 7th ed., pp. 359–361; *De Reneville* (*orse. Sheridan*) v. *De Reneville* [11]; *Hill* (*orse. Petchey*) v. *Hill* [12]; *Easterbrook* v. *Easterbrook* (*orse. Jervis*) [13]; *Hutter* v. *Hutter* (*orse. Perry*) [14]; Formation and Annulment of Marriage, by J. Jackson, 1951 ed., p. 302.]

It is submitted: (1) *Casey* [15] and *Ramsay-Fairfax* [16] are conflicting decisions of the Court of Appeal and therefore this court can decide the question of jurisdiction as res integra: *Young* v. *Bristol Aeroplane Co.* [17] and *Morelle Ltd.* v. *Wakeling.* [18] (2) Jurisdiction in nullity cases in the ecclesiastical courts was based on residence within the diocese and no distinction was drawn between void and voidable marriages. (3) By section 22 of the Matrimonial Causes Act, 1857, the divorce court was enjoined to exercise its jurisdiction in nullity in accordance with principles and rules conforming to those of the ecclesiastical courts "as "nearly as may be." (4) Parliament by the use of those words "as nearly as may be" contemplated that the courts might find

[6] [1931] P. 29.
[7] [1949] P. 420.
[8] Ibid.
[9] [1956] P. 115.
[10] [1949] P. 420.
[11] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56, C.A.
[12] [1960] P. 130; [1959] 3 W.L.R. 828; [1959] 3 All E.R. 754.
[13] [1944] P. 10; 60 T.L.R. 80; [1944] 1 All E.R. 90.
[14] [1944] P. 95; 60 T.L.R. 541; [1944] 2 All E.R. 368.
[15] [1949] P. 420.
[16] [1956] P. 115.
[17] [1944] K.B. 718; 60 T.L.R. 536; [1944] 2 All E.R. 293, C.A.
[18] [1955] 2 Q.B. 379; [1955] 2 W.L.R. 672, C.A.

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it necessary in some respects to modify or extend the ecclesiastical rules and principles, and in two respects for the purposes of jurisdiction in nullity the courts have done so, namely, (a) the extension of jurisdiction where the marriage was celebrated in England, and (b) the extension of jurisdiction where the parties are domiciled in England. (5) The assumption of these bases of jurisdiction has worked well and smoothly, as the cases show. The courts would not wish to interfere unless they felt themselves bound to do so for some compelling reason. (6) If domicile is not the sole and exclusive basis of jurisdiction, then there is no compelling reason requiring the courts to change settled law and accept residence as an additional basis of jurisdiction while rejecting the lex loci celebrationis. On the contrary, there is much to be said in favour of the lex loci celebrationis as the competent forum for considering the validity of marriages. That submission is supported by the reasoning of Lord MacDermott C.J. in *Addison (orse. McAllister)* v. *Addison*,[19] which is adopted as part of the appellant's argument. (7) If the court is against those submissions and considers that the lex loci celebrationis is only a basis of jurisdiction in some, but not all, nullity cases, then the distinction between incapacity and wilful refusal is a valid distinction for purposes of jurisdiction, because there is a real distinction between incapacity which exists at the time of the marriage and wilful refusal which supervenes afterwards. If the court holds that this narrow ground is the only basis for jurisdiction, then the appeal should be allowed to the extent of permitting the wife to proceed with her petition on the ground of incapacity only. [Reference was made to Shelford on Marriage and Divorce, 1841 ed., pp. 123–124, 131, 485–486, 479–481, and *Scrimshire* v. *Scrimshire*.[20]]

F. Laskey for the respondent husband. Karminski J.'s decision should be upheld. Two questions arise: (1) whether the fact standing alone of the marriage celebrated in England gives this court jurisdiction to try the issue of nullity where neither party is domiciled or resident here; and (2) whether this court is bound to follow *Casey*.[21] [Reference was made to Halsbury's Laws of England, 3rd ed., vol. 22, pp. 796–797; *Quinn* v. *Leathem*[22]; *Jacobs* v. *London County Council*[23]; *Fairman* v.

[19] [1955] N.I. 1.
[20] (1752) 2 Hag.Con. 395.
[21] [1949] P. 420.
[22] [1901] A.C. 495.
[23] [1950] A.C. 361; 66 T.L.R. (Pt. 1) 659; [1950] 1 All E.R. 737, H.L.

Perpetual Building Society.[24]] *Casey*[25] and *Ramsay-Fairfax*[26] cannot be said to be completely inconsistent. In *Casey*[27] Bucknill L.J.'s first ground for his decision was based on *Inverclyde*,[28] and that part of his judgment goes because *Inverclyde*[28] was overruled in *Ramsay-Fairfax*.[29] But his second ground was based on hardship and convenience, with which Somervell L.J. agreed, and that ground therefore remains as the ratio decidendi of the case and as such does not conflict with the decision in *Ramsay-Fairfax*.[29] The court cannot apply *Addison*[30] unless they can distinguish *Casey*.[31] *Addison*[32] would be of importance if the matter were res integra, but in any event it is submitted that that decision goes too far.

The courts of the lex loci celebrationis have jurisdiction where the validity of the marriage itself is concerned, i.e., where the marriage is void for want of form or from incapacity: *De Reneville* v. *De Reneville*[33] and *Sottomayor* v. *De Barros*.[34] The incapacity can be legal or physical, e.g., bigamy, consanguinity, as well as impotence. The courts, however, do not have jurisdiction regarding anything which occurs after the ceremony, such as wilful refusal. Cases of wilful refusal nearly always contain allegations of incapacity and a distinction between the two would be extremely inconvenient in practice because part of the case would be triable here and part in another jurisdiction: *Hill* (*orse. Petchey*) v. *Hill*.[35]

[WILLMER L.J. But if the husband fraudulently entered into the marriage intending to leave the wife immediately after the ceremony? Surely the state of mind of the parties is a basic element of the validity of the ceremony?]

There has to be true consent and the parties give that by going through the ceremony. If the husband had no intention of consummating the marriage, that would not affect the ceremony itself and therefore would not concern the courts of the country in which the marriage was celebrated.

[UPJOHN L.J. It is impossible to distinguish between impotency and wilful refusal. If the marriage is void the court of the place of celebration has jurisdiction; if it is voidable it does not; surely that is your submission?]

[24] [1923] A.C. 74; 39 T.L.R. 54, H.L.
[25] [1949] P. 420.
[26] [1956] P. 115.
[27] [1949] P. 420.
[28] [1931] P. 29.
[29] [1956] P. 115.
[30] [1955] N.I. 1.
[31] [1949] P. 420.
[32] [1955] N.I. 1.
[33] [1948] P. 100.
[34] (1877) 3 P.D. 1, C.A.
[35] [1960] P. 130.

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No; the distinction that is being made is between marriages which are void ab initio and those which are invalid. A bigamous marriage is void ab initio and a nullity decree is unnecessary, but if one is required, then the courts of the lex loci celebrationis have jurisdiction because it is a matter of personal incapacity at the time of the ceremony. Similarly the three grounds for annulling a marriage under section 8 of the Matrimonial Causes Act, 1937 (mental deficiency, venereal disease and pregnancy), are all matters going to the personal capacity of the parties, and although the statute has provided that such marriages are voidable, it is submitted that for the purposes of jurisdiction they fall within the same category as a bigamous marriage and their validity is to be determined by the courts of the place of celebration.

Scrimshire [36] established that the law by which the validity of a marriage must be adjudged is the law of the country where it was celebrated, but that is far from saying that it must be tried in that country. Where jurisdiction is assumed on grounds other than domicile the decision may be valid in the place where it is given but invalid elsewhere.

Each person who contracts a marriage must be doing so under the condition precedent that he is free of impediments to marriage. It is more convenient for matters of form to be tried by the courts of the place of celebration because those courts are dealing with forms which they know. Similarly where there is a defect of personal status, such as consanguinity or a previous valid marriage, that too should be tried by the courts of the lex loci celebrationis because such a defect is present at the time of the ceremony. But wilful refusal has nothing to do with the celebration of the marriage and occurs after the ceremony; therefore, although it may be inconvenient for some purposes to exclude it from the jurisdiction of the courts of the lex loci celebrationis, this must necessarily follow.

[Reference was made to *Hutter* v. *Hutter* [37]; *Simonin* v. *Mallac* [38]; *Dalrymple* v. *Dalrymple* [39]; *Linke* (*orse. Van Aerde*) v. *Van Aerde* [40]; *Easterbrook* v. *Easterbrook* (*orse. Jervis*) [41]; *Niboyet* v. *Niboyet* [42]; *Le Mesurier* v. *Le Mesurier*.[43]]

Latey Q.C. in reply. English courts have accepted jurisdiction in the following nullity cases because the marriage was

[36] 2 Hag.Con. 395.
[37] [1944] P. 95.
[38] (1860) 2 Sw. & Tr. 67.
[39] (1811) 2 Hag.Con. 54.
[40] (1894) 10 T.L.R. 426.
[41] [1944] P. 10.
[42] (1878) 4 P.D. 1, C.A.
[43] [1895] A.C. 571; 11 T.L.R. 48.

celebrated here: *Simonin* v. *Mallac*[44]; *Sottomayor* v. *De Barros*[45]; *Cooper* v. *Crane*[46]; *Linke* (*orse. Van Aerde*) v. *Van Aerde*[47]; *Hussein* (*orse. Blitz*) v. *Hussein*[48]; *Galene* v. *Galene* (*orse. Galice*),[49] and *Srini Vasan* (*orse. Clayton*) v. *Srini Vasan*.[50] The argument seems primarily to depend on whether nullity cases should for jurisdictional purposes be divided into categories where some cases in one category can be decided in the English courts and others in the same category cannot. Wherever one seeks to draw the line, the matter is bound to lead to difficulty and there is no justification for making any distinction in nullity cases. [Reference was made to Rayden on Divorce, 7th ed., p. 51, and note (*c*), p. 63.]

Cur. adv. vult.

Dec. 20. WILLMER L.J. First of all, I should like to say how sorry we are that Ormerod L.J. is unable to be with us today, but the judgment I am about to read is the judgment of the court.

The appellant (who for convenience is referred to hereafter as the wife) seeks a decree of nullity against the respondent husband on the ground of his incapacity, or, alternatively, his wilful refusal to consummate the marriage. The question which has arisen is whether the High Court has jurisdiction to entertain the suit, having regard to the fact that the husband is domiciled in Scotland and has not at any material time been resident in England. For the reasons given in *De Reneville* (*orse. Sheridan*) v. *De Reneville*,[1] the domicile of the wife must be regarded as the same as that of the husband unless and until the marriage is annulled.

In 1927 it was decided by the House of Lords in *Salvesen or Von Lorang* v. *Austrian Property Administrator*[2] that the court of the domicile has in all cases jurisdiction to pronounce a decree of nullity. But in that case Viscount Haldane observed[3]: "Whether there cannot be jurisdiction which is not that of the "domicile in restricted instances to entertain a suit for nullity is "a question we have not before us for determination." Commenting on this observation in *De Reneville* v. *De Reneville*,[4]

[44] 2 Sw. & Tr. 67.
[45] 3 P.D. 1.
[46] [1891] P. 369.
[47] 10 T.L.R. 426.
[48] [1938] P. 159; 54 T.L.R. 632; [1938] 2 All E.R. 344.
[49] [1939] P. 237; 55 T.L.R. 505; [1939] 2 All E.R. 148.
[50] [1946] P. 67; 61 T.L.R. 415; [1945] 2 All E.R. 21.
[1] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56, C.A.
[2] [1927] A.C. 641; 43 T.L.R. 609, H.L.
[3] [1927] A.C. 641, 654.
[4] [1948] P. 100, 108.

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Lord Greene M.R. said: "This doubtful question remains to be "answered by the House of Lords, and there is no need for us to "attempt to answer it for the purposes of this appeal."

Since then it has been decided by this court in *Ramsay-Fairfax* (*orse. Scott-Gibbon*) v. *Ramsay-Fairfax*,[5] that jurisdiction to pronounce a decree of nullity exists where the parties are resident, although not domiciled, in England, and that for this purpose no distinction is to be drawn between marriages which are void ab initio and those which are merely voidable. The further question which is now raised by the present appeal is whether jurisdiction exists in a case where the parties are not domiciled, and the respondent is not resident, in England, on the ground that the marriage was celebrated in England, the marriage in this case having taken place at Newcastle-upon-Tyne on July 8, 1955.

The appeal is from the decision of Karminski J., who held that he had no jurisdiction to entertain the suit. He reached this conclusion because he held himself bound by the decision of this court in *Casey* v. *Casey*,[6] although it is to be remarked that in that case the petition was on the ground of wilful refusal only, and no question of incapacity arose. The judge considered, but declined to follow, the decision in *Hill* (*orse. Petchey*) v. *Hill*,[7] where Collingwood J., distinguishing *Casey* v. *Casey*,[8] held that he had jurisdiction to entertain a suit for nullity on the ground of incapacity where the marriage had been celebrated in England, notwithstanding that the parties were domiciled, and the respondent husband was resident, in Scotland. Karminski J. also considered, but held that he was not free to follow, the decision in *Addison* (*orse. McAllister*) v. *Addison*,[9] where Lord MacDermott C.J. in a case indistinguishable on its facts from the present case, after a full review of all the English authorities, including *Casey* v. *Casey*,[10] decided that the court of Northern Ireland did have jurisdiction to entertain the suit.

The decision in *Casey* v. *Casey* [10] has not by any means been received with universal favour and approval by textbook writers and commentators. But, being a decision of this court, it is clearly binding upon us, unless it can be shown that its ratio decidendi is so inconsistent with other authority by which we are

[5] [1956] P. 115; [1955] 3 W.L.R. 188 & 849; [1955] 3 All E.R. 695, C.A.
[6] [1949] P. 420; 65 T.L.R. 528; [1949] 2 All E.R. 110, C.A.
[7] [1960] P. 130; [1959] 3 W.L.R. 828; [1959] 3 All E.R. 754.
[8] [1949] P. 420.
[9] [1955] N.I. 1.
[10] [1949] P. 420.

bound that we are free to consider the matter afresh and decide which of the conflicting decisions we ought to follow. In considering *Casey* v. *Casey*,[10] however, we are met by the difficulty that the members of this court who heard that case did not speak with one voice. In that case, which arose out of a wife's petition for nullity on the ground of wilful refusal, the respondent husband was domiciled and ordinarily resident in one of the provinces of Canada, and the question was whether the fact of the marriage having been celebrated in England was sufficient to confer jurisdiction. All the members of the court agreed that it was not, but their reasons for this conclusion differed. Bucknill L.J., with whose judgment Cohen L.J. expressed his complete agreement, based his decision partly on the balance of hardship to the parties, but mainly on the analogy of the rule that the court of the domicile of the husband is the sole court with jurisdiction to dissolve a valid marriage; and he thought it reasonable that a similar rule should be applied to a marriage which is merely voidable on the ground of wilful refusal to consummate it. The view of Somervell L.J. was that jurisdiction based on the place where the marriage was celebrated should be confined to cases where the validity of the ceremony itself was attacked. He said[11]: "The mere fact that the "ceremony of marriage took place in a country does not seem to "me a ground for founding jurisdiction in cases where the "matters alleged in the petition do not in any way dispute the "validity of the ceremony as effecting a marriage."

In expressing the view of the majority, Bucknill L.J. was following and adopting the same reasoning as was followed by Bateson J. in *Inverclyde* (*orse. Tripp*) v. *Inverclyde*,[12] namely, that so far as jurisdiction is concerned there is no distinction in principle between a petition to dissolve a valid marriage and a petition to annul a marriage which is merely voidable whether for incapacity or wilful refusal. The argument for the wife in the present case is that this line of reasoning has now been expressly disapproved in *Ramsay-Fairfax* v. *Ramsay-Fairfax*,[13] where this court not only overruled *Inverclyde* v. *Inverclyde*,[14] but held, approving the decision of Pilcher J. in *Hutter* v. *Hutter* (*orse. Perry*),[15] that for the purposes of founding jurisdiction in nullity proceedings no distinction is to be drawn between marriages

[10] [1949] P. 420.
[11] Ibid. 433.
[12] [1931] P. 29; 47 T.L.R. 140.
[13] [1956] P. 115.
[14] [1931] P. 29.
[15] [1944] P. 95; 60 T.L.R. 541; [1944] 2 All E.R. 368.

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which are void ab initio and those which are merely voidable. It follows, so it is contended, that the main ground on which the majority in *Casey* v. *Casey* [16] based their decision is in conflict with the express decision of this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax*.[17] As to the minority view expressed by Somervell L.J.—which is the view that Karminski J. was himself disposed to adopt in the present case—it is contended that this, being a minority view, is not binding upon us. It is, moreover, attacked as being unsupported by authority, unsound in principle, and impossible of application in practice. Counsel for the wife further relied, in support of his argument, on a dictum of Denning L.J. in *Ramsay-Fairfax* v. *Ramsay-Fairfax*, where he said [18]: "It may be in these nullity cases that the courts of the domicile "also have jurisdiction: so may the courts of the place where "the marriage was celebrated."

The question which has arisen for decision in the present case is one with a long history behind it. The jurisdiction of the High Court in relation to nullity proceedings is derived from that exercised by the ecclesiastical courts before the passing of the Matrimonial Causes Act, 1857. In this respect it differs from the jurisdiction to dissolve marriages, which is wholly statutory. Section 22 of the Act of 1857 provided: "In all suits and pro-"ceedings, other than proceedings to dissolve any marriage, the "said court"—that is to say, the new court for divorce and matrimonial causes—"shall proceed and act and give relief on "principles and rules which in the opinion of the said court shall "be as nearly as may be conformable to the principles and rules "on which the ecclesiastical courts have heretofore acted and given "relief." This section was repealed by the Judicature (Consolidation) Act, 1925, but its substance was re-enacted by section 32 of that Act, which provides: ". . . where no special provision is "contained in this Act or in rules of court with reference thereto, "any such jurisdiction shall be exercised as nearly as may be in "the same manner as that in which it might have been exercised "by the court to which it formerly appertained." It is true that additional grounds, unknown to the ecclesiastical courts, are now available by statute for seeking a decree of nullity. But we do not think that this circumstance makes any difference from the point of view of jurisdiction: for, as was said by Morris L.J. in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [19]: "those are merely

[16] [1949] P. 420.
[17] [1956] P. 115.
[18] Ibid. 134.
[19] [1956] P. 115, 135.

"additional grounds for the granting of a decree of nullity by the "court if the court is endowed with a jurisdiction to grant a decree "of nullity."

The ecclesiastical courts in practice assumed jurisdiction, in theory at least, only in cases where the party proceeded against was resident within the particular diocese, their powers in this respect being restricted by the Ecclesiastical Jurisdiction Act, 1531. No case has been cited to us in which any ecclesiastical court assumed jurisdiction on the mere ground that the marriage was celebrated within the jurisdiction of the diocese. On the other hand, there is authority for the proposition that they recognised that the court of the place of celebration provided a natural forum for adjudicating on the validity of a marriage. Thus in 1752, in *Scrimshire* v. *Scrimshire* [20]—a restitution suit between parties who had contracted a marriage in France which was illegal by French law—Sir Edward Simpson said [21]: "I take it to "be clear, that both parties in the cause had obtained a forum in "France, where the marriage contract was entered into; and by "marrying there, had subjected themselves to be punished by the "laws of the country for a clandestine marriage; and had also "subjected the validity of the contract to be tried by the laws of "that country." Again in 1811, in *Dalrymple* v. *Dalrymple* [22]—another restitution suit, in which the husband was of Scottish origin and the marriage took place in Scotland—Sir William Scott said [23]: "I am not aware that the case so brought here is "exposed to any serious disadvantage, beyond that which it must "unavoidably sustain in the inferior qualifications of the person, "who has to decide upon it, to the talents of the eminent men, "to whose judgment it would have been submitted, in its more "natural forum." We think it may be inferred that, had they not been restricted by the provisions of the Ecclesiastical Jurisdiction Act, and had facilities existed, such as are now available, for service out of the jurisdiction, the ecclesiastical courts would not have been slow to assume jurisdiction to pronounce on the validity of any marriage celebrated within the diocese.

What is of vital significance in relation to the question now under consideration is that the ecclesiastical courts drew no distinction, from the point of view of jurisdiction, between marriages void ab initio and those which were merely voidable. Jurisdiction was readily assumed in the case of voidable marriages,

[20] (1752) 2 Hag.Con. 395.
[21] Ibid. 411.
[22] (1811) 2 Hag.Con. 54.
[23] Ibid. 59.

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for instance, in cases of physical incapacity. Whatever the ground on which relief was claimed the decree was always in the same form, and pronounced the marriage esse et fuisse nullum. The decree of nullity as pronounced by the High Court today is substantially similar, and the same form is used whatever the ground for pronouncing the decree.

Since the passing of the Matrimonial Causes Act, 1857, the court has assumed jurisdiction in nullity cases of various kinds, where no ground for asserting jurisdiction existed apart from the fact of the marriage having been celebrated in England. In *Simonin* v. *Mallac* [24] the marriage was celebrated in England; the parties were minors, domiciled and resident in France, who came to this country to be married for the purpose of evading the requirements of French law with regard to parental consent. The question of the jurisdiction of the English court was fully argued, and it was held by the full court that jurisdiction existed on the ground that the marriage had been celebrated in England. The marriage was regular in form and perfectly good by English law, but the court went on to consider whether it could be avoided having regard to the law of the domicile. As a matter of history the decision was that English law was applicable, and not the law of the domicile, so that the marriage was pronounced valid and the petition for nullity was dismissed. No doubt the question, if it arose today, would be decided the other way, and to that extent the decision is of no weight. But in so far as it was decided that the English court had jurisdiction, the decision has stood for 100 years, and though frequently cited has never been overruled, or even questioned. It is not without significance that it was referred to without disapproval by the House of Lords in *Salvesen's* case.[25]

Sottomayor v. *De Barros* [26] was a case of a marriage in England between parties domiciled in Portugal. The parties were first cousins, and the marriage, though good by English law, was incestuous by the law of Portugal. Jurisdiction to hear the case was assumed without argument, and a decree of nullity was granted on the ground of the personal incapacity of the parties, which it was held must be determined according to the law of the domicile. The fact that jurisdiction was assumed without argument becomes, we think, a matter of some significance when it is recorded that the case was tried at first instance by Sir Robert

[24] (1860) 2 Sw. & Tr. 67.
[25] [1927] A.C. 641.
[26] (1877) 3 P.D. 1. C.A.

Phillimore,[27] and subsequently went to the Court of Appeal, consisting of James, Baggallay and Cotton L.JJ.[28]

In *Cooper* v. *Crane* [29] the marriage was celebrated in England between an English woman and a man domiciled and resident in the United States of America. The marriage was regular in form, but the wife petitioned for a decree of nullity on the ground that her consent was obtained by duress. Jurisdiction was again assumed without argument, and in the event the petition was dismissed on the facts. The case is of significance in that jurisdiction was assumed without argument though the marriage was merely voidable.

In *Linke* (*orse. Van Aerde*) v. *Van Aerde*,[30] where a marriage was celebrated in this country between parties domiciled in Belgium, the question of jurisdiction was argued, and *Simonin* v. *Mallac* [31] and *Sottomayor* v. *De Barros* [32] were cited. It transpired that the marriage was bigamous. It was held by Gorell Barnes J.[33] that "The jurisdiction of this court to deal with the "question of the validity of the marriage of the parties to the "present suit was therefore clear," and he pronounced a decree of nullity accordingly.

Hussein (*orse. Blitz*) v. *Hussein* [34] was another case in which a decree of nullity was sought by a wife on the ground that the marriage was induced by duress. In this case the husband's domicile was in Egypt, but the marriage was celebrated in England. Henn Collins J. expressed himself as satisfied that he had jurisdiction to entertain the suit.

Lastly, in *Galene* v. *Galene* (*orse. Galice*),[35] the parties were domiciled in France, but the marriage was celebrated in England. A decree of nullity had been obtained in France, on the ground that the marriage was defective in form, being clandestine and without parental consent as required by French law. When a petition was presented in this country no question was raised, or doubt expressed, as to the jurisdiction of the court, and Henn Collins J. pronounced a decree of nullity.

In none of these cases were the parties domiciled in this country, nor was the party proceeded against resident here. We have ventured to cite them as showing that over the last 100

[27] (1877) 2 P.D. 81.
[28] 3 P.D. 1.
[29] [1891] P. 369.
[30] (1894) 10 T.L.R. 426.
[31] 2 Sw. & Tr. 67.
[32] 3 P.D. 1.
[33] 10 T.L.R. 426.
[34] [1938] P. 159; 54 T.L.R. 632; [1938] 2 All E.R. 344.
[35] [1939] P. 237; 55 T.L.R. 505; [1939] 2 All E.R. 148.

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years the courts of this country, including the Court of Appeal, have from time to time assumed jurisdiction in nullity cases on the sole ground of the marriage having been celebrated here, and have done so in cases both of void and voidable marriages.

In the meantime, in 1927, in *Salvesen's* case,[36] the House of Lords made it clear that the court of the domicile always has jurisdiction to pronounce on the validity of a marriage wherever celebrated. Lord Phillimore went further and expressed the view[37] that the court of the domicile was the only competent court. This expression of view was not necessary for the decision of the case before the House, and, as we have already indicated, Viscount Haldane, who gave the leading speech, was careful to leave this question open. What is significant with regard to *Salvesen's* case[38] is that none of their Lordships sought to draw any distinction, from the point of view of jurisdiction in nullity, between marriages void ab initio and those which are merely voidable.

This distinction was first drawn by Bateson J. in 1931 in *Inverclyde* v. *Inverclyde*.[39] In that case the petition was by a wife against a husband domiciled in Scotland, and was on the ground of incapacity. Bateson J. held that in the case of a voidable, as opposed to a void, marriage only the court of the domicile had jurisdiction to annul the marriage, and he refused relief notwithstanding that the marriage had been celebrated in England. The distinction which Bateson J. sought to draw between void and voidable marriages marked a wholly new departure. His decision was not followed by Hodson J. in *Easterbrook* v. *Easterbrook* (*orse. Jervis*),[40] nor by Pilcher J. in *Hutter* v. *Hutter*.[41] In each of these cases the petition was by an English wife against a husband domiciled abroad, though temporarily resident here, praying for a decree of nullity on the ground of wilful refusal to consummate the marriage. In both cases the marriage had been celebrated in England. Both were undefended suits, but in *Hutter* v. *Hutter*[41] Pilcher J. had the advantage of hearing the question of jurisdiction fully argued with the assistance of counsel for the King's Proctor. We think it is clear that in the latter case the judge, rejecting the distinction drawn by Bateson J. between void and voidable marriages, rested his decision in favour of

[36] [1927] A.C. 641.
[37] Ibid. 671.
[38] [1927] A.C. 641.
[39] [1931] P. 29.
[40] [1944] P. 10; 60 T.L.R. 80; [1944] 1 All E.R. 90.
[41] [1944] P. 95; 60 T.L.R. 541; [1944] 2 All E.R. 368.

granting relief partly on the ground of the residence of the respondent, and partly on the ground of the marriage having been celebrated in England. As we have already indicated, the decision of Bateson J. in *Inverclyde* v. *Inverclyde* [42] was finally overruled by this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax*.[43] At the same time, *Easterbrook* v. *Easterbrook* [44] and *Hutter* v. *Hutter* [45] were expressly approved. It may be remarked that there is no inconsistency between the decision in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [46] and that in the earlier case of *De Reneville* v. *De Reneville*,[47] where the distinction drawn between a void and a voidable marriage was relevant, but relevant only, for the purpose of determining the domicile of the petitioning wife.

We have ventured to set out these decisions in their historical sequence with a view to examining the decision in *Casey* v. *Casey* [48] in its historical context. To this we will return presently. For the moment we content ourselves with the remark that, whether or not we hold ourselves bound by it, the decision is in striking conflict with the current of authority which—apart from *Inverclyde* v. *Inverclyde*,[49] since held to have been wrongly decided—had been flowing steadily in the opposite direction for a period of many years.

The decision of Lord MacDermott in *Addison* v. *Addison*,[50] though not binding upon this court, is clearly one that is worthy of our respectful consideration. The facts in that case were, mutatis mutandis, indistinguishable from those of the present case. The petition was by a wife resident in Northern Ireland praying for a decree of nullity against her husband on the ground of incapacity, or, alternatively, wilful refusal to consummate the marriage. The husband was domiciled and resident in England, but the marriage had been celebrated in Northern Ireland, and it was on that ground that the jurisdiction of the Northern Irish court was invoked. Lord MacDermott, in a very full judgment, reviewed all the authorities and, anticipating the conclusion reached later in the same year by this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax*,[51] held that, for the purposes of establishing jurisdiction in nullity proceedings, no distinction is to be drawn between void and voidable marriages. He came to the conclusion

[42] [1931] P. 29.
[43] [1956] P. 115.
[44] [1944] P. 10.
[45] [1944] P. 95.
[46] [1956] P. 115.
[47] [1948] P. 100.
[48] [1949] P. 420.
[49] [1931] P. 29.
[50] [1955] N.I. 1.
[51] [1956] P. 115.

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that, in the light of the authorities, it must be accepted that the court of the ceremony has, as such, a jurisdiction to annul, and decided that this jurisdiction must extend alike to the case of voidable marriages as it does to those which are void ab initio. He concluded by observing[52]: "There is much to be said for "committing any plea that strikes at the creation of a valid "marriage bond—be it one of bodily or mental or juristic in- "capacity or of a failure to observe the requisite formalities—to "the court of the place where the bond is forged. It seems the "natural forum to decide such issues and in practice it will often "be that best versed in the law to be applied." He accordingly assumed jurisdiction and pronounced a decree.

It remains to refer once more to *Hill* v. *Hill*,[53] where the petition was on the ground of incapacity only, and Collingwood J. felt able to distinguish *Casey* v. *Casey*.[54] As we understand his judgment, he reached this conclusion on two grounds, namely: (1) there is a fundamental difference between incapacity and wilful refusal, in that the former is something which must exist at the time of the marriage, whereas the latter can arise only after the marriage, the existence of a valid marriage being a condition precedent to the cause of complaint; (2) incapacity was a matter regularly dealt with by the ecclesiastical courts, who, however, knew nothing of wilful refusal as affording a ground for relief. We find ourselves quite unable to accept the distinctions which Collingwood J. drew. It is well known that incapacity and wilful refusal are frequently alleged as alternatives. This is because it is often impossible in practice to form any view, in a case where the marriage has not been consummated, as to whether this has been due to incapacity or to wilful refusal until all the evidence has been given. It would, we think, be the height of absurdity if the court had to hear the whole of a case before it could decide whether or not it had jurisdiction to entertain it. In the present case, for instance, it would be quite anomalous to decide that there is jurisdiction to entertain the plea of incapacity but not that of wilful refusal, seeing that the same evidence must be adduced in order to establish either the one or the other.

It seems to us that there are three possible views: (1) that in no case does the court have jurisdiction to entertain proceedings for nullity where the sole ground for asserting jurisdiction is the fact of the marriage having been celebrated in England;

[52] [1955] N.I. 1, 32.
[53] [1960] P. 130.
[54] [1949] P. 420.

(2) that the fact of the marriage having been celebrated in England is enough of itself to confer jurisdiction in some cases but not in others; (3) that in every case where the marriage has been celebrated in England that fact is of itself sufficient to confer jurisdiction, whatever the ground of complaint.

The first of these alternatives has not been argued before us by counsel for the husband, who conceded that in the light of the authorities jurisdiction must be held to exist at least in cases where the formal validity of the ceremony or the juristic capacity of the parties is called in question. In any case it appears to us that, having regard to the cases we have referred to, beginning with *Simonin* v. *Mallac*[55] and extending over the last century, it is now much too late to assert that in no case will the court assume jurisdiction on the sole ground of the marriage having been celebrated in England.

It is to the second alternative that the argument has been mainly directed. But if it is to be held that the fact of celebration in England is enough of itself to confer jurisdiction in some classes of case but not in others, the difficulty immediately arises of determining at what point the dividing line is to be drawn. We have already referred to the difficulty of distinguishing, for the purposes of jurisdiction, between a plea of incapacity and a plea of wilful refusal. Apart from *Hill* v. *Hill*,[56] there appears to be no authority for drawing the line at this point. The main ground on which the majority in *Casey* v. *Casey*[57] rested their decision, namely, the distinction between marriages void ab initio and those which are merely voidable, has been cut away since this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax*[58] overruled the decision of Bateson J. in *Inverclyde* v. *Inverclyde*.[59] The alternative ground, namely, that of balance of hardship to the parties, does not appear to be supported by authority, and does not in our view furnish a suitable, or, indeed, a practicable, test for determining a question of jurisdiction. The view expressed by Somervell L.J., and adopted by Karminski J. in the present case, is equally unsupported by authority. On this view, jurisdiction would be excluded in cases of bigamy, or, indeed, in any case where the juristic capacity of the parties is called in question. If, on the other hand, it is to be held that jurisdiction exists where juristic capacity is in question, on what principle, it may be asked, is it to be excluded where the issue relates to physical

[55] 2 Sw. & Tr. 67.
[56] [1960] P. 130.
[57] [1949] P. 420.
[58] [1956] P. 115.
[59] [1931] P. 29.

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capacity? Furthermore, on this view, jurisdiction would be excluded in cases where it is alleged that the consent of the petitioner was vitiated by fraud or duress. If the dividing line is to be drawn where Somervell L.J. suggested, it would seem that *Sottomayor* v. *De Barros*,[60] *Cooper* v. *Crane*,[61] *Linke* v. *Van Aerde* [62] and *Hussein* v. *Hussein* [63] would all have to be held to have been wrongly decided, and one of the grounds for the decision in *Hutter* v. *Hutter* [64] (notwithstanding the approval of that decision by this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [65]) would have to be held to have been misconceived.

The only remaining alternative is to say that jurisdiction exists to entertain a suit for nullity of any class whenever it is shown that the marriage was celebrated in England. We can only take this course if we are free to hold that *Casey* v. *Casey* [66] was wrongly decided; and this we can do only if satisfied that the present case is covered by one of the three exceptions to the rule binding this court to follow its own previous decisions which were mentioned by Lord Greene M.R. in *Young* v. *Bristol Aeroplane Co.*[67] Of these three exceptions only the first could possibly apply here. We do not think we are bound to follow the minority view expressed by Somervell L.J. in *Casey* v. *Casey*.[68] The question to be determined is whether the view of the majority, which must be regarded as the ratio decidendi of the case, is in conflict with any other decision of this court, so that we are free to choose which of the conflicting decisions we ought to follow. We have felt considerable difficulty in reaching a conclusion on this point, but, after careful consideration, we have come to the conclusion that the decision of the majority in *Casey* v. *Casey* [68] cannot stand with the unanimous decision of this court in *Ramsay-Fairfax* v. *Ramsay-Fairfax*.[69] In the latter case, as we understand it, it was decided once and for all that no distinction is to be drawn, for jurisdictional purposes, between marriages which are void ab initio and those which are merely voidable. If that is correct, the decision in that case was clearly in conflict with the ratio of the judgment of the majority in *Casey* v. *Casey*.[70] This court must therefore decide which of these two conflicting decisions it will follow, and we entertain no doubt that the decision in

[60] 3 P.D. 1.
[61] [1891] P. 369.
[62] 10 T.L.R. 426.
[63] [1938] P. 159.
[64] [1944] P. 95.
[65] [1956] P. 115.
[66] [1949] P. 420.
[67] [1944] K.B. 718, 729; 60 T.L.R. 536; [1944] 2 All E.R. 293, C.A.
[68] [1944] P. 420.
[69] [1956] P. 115.
[70] [1949] P. 420.

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Ramsay-Fairfax v. *Ramsay-Fairfax* [71] is to be preferred and should be followed.

In reaching this conclusion we are encouraged to find that it is supported by the weighty authority of Lord MacDermott in *Addison* v. *Addison*.[72] We would venture to adopt the reasoning which led him to his conclusion in that case.

In our judgment, the marriage in the present case having been celebrated in England, the High Court has jurisdiction to pronounce on its validity and, for the purpose of doing so, to inquire into both the grounds on which its validity is impugned.

The appeal must, therefore, be allowed.

Appeal allowed with costs. Order below as to costs varied to allow whole of defendant's costs below. Leave to appeal to House of Lords.

Solicitors: *Gibson & Weldon for Frederick Gowen & Stevens, Croydon; Kenneth Brown, Baker, Baker.*

C. J. E.

[71] [1956] P. 115.

[72] [1955] N.I. 1.

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June 28, 29; *July* 28.

Hodson, Ormerod and Harman L.JJ.

Husband and Wife—Justices—Submission of no case—Election—Right of Divisional Court to order rehearing—Whether husband bound on rehearing by original election to call no evidence.

Husband and Wife—Justices—Public interest in proceedings—Election to call no evidence—Whether evidence may be called at rehearing.

Practice—Submission of no case—Election—Right of appellate court to order rehearing.

At the hearing of a wife's complaints of persistent cruelty and desertion, the justices upheld the husband's submission, upon which he elected to stand, that there was no case to answer, and dismissed the complaints. The Divisional Court allowed her appeal and ordered a rehearing. On appeal by the wife from the order of the Divisional Court it was contended for her that the Divisional Court, having allowed her appeal, were wrong in ordering a rehearing, and should either have made an order in her favour or remitted the case to the justices for further findings of fact:—

[Reported by A. H. BRAY, Esq., Barrister-at-Law.]

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Held, (1) that where the submission of no case was based on the unsatisfactory or unreliable nature of the evidence led for the plaintiff, and the appellate court found itself unable on the findings of the court below to come to a just conclusion, the only course to be adopted in the interests of justice was to order a new trial, even if the defendant had elected to stand on his submission.

Alexander v. *Rayson* [1936] 1 K.B. 169; 52 T.L.R. 131, C.A.; *Parry* v. *Aluminium Corporation Ltd.* [1940] W.N. 44; 56 T.L.R. 318, C.A.; *Laurie* v. *Raglan Building Co. Ltd.* [1942] 1 K.B. 152; [1941] 3 All E.R. 332, C.A.; and *Yuill* v. *Yuill* [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183, C.A. considered.

(2) That if there was to be a rehearing, the husband should not be bound by his previous election and could not be denied the opportunity of giving evidence.

(3) That, subject to the qualification that there was always a discretion remaining in the tribunal in the exercise of which the question of status should be borne in mind, there was no reason why the practice in divorce cases should differ from that in other cases where a party submitted that there was no case to answer; accordingly, the Divisional Court were right in directing a rehearing.

Wilson v. *Wilson* [1958] 1 W.L.R. 1090; [1958] 3 All E.R. 195; *Horton* v. *Horton* [1960] 1 W.L.R. 987; [1960] 1 All E.R. 503; and dicta of Lord Merriman P. in *Ramsden* v. *Ramsden* [1954] 1 W.L.R. 1105; [1954] 2 All E.R. 623, D.C. considered.

Decision of Divisional Court affirmed.

APPEAL by leave from the Divisional Court (Lord Merriman P. and Collingwood J.).

Complaints were issued by a wife, Patricia Doris Storey, against her husband, Kenneth David Storey, alleging that he had been guilty of persistent cruelty towards her and had deserted her. At the hearing before the Southampton justices on October 8 and November 5, 1959, the husband through his solicitor submitted that there was no case to answer and on being put to his election chose to stand upon his submission and called no evidence. The justices upheld the submission and dismissed the complaints.

The wife appealed to the Divisional Court which, on January 20, 1960, allowed her appeal and ordered a rehearing by a fresh panel of justices. On February 3, 1960, the Divisional Court granted the wife leave to appeal to the Court of Appeal on the question whether the case should be reheard or whether, having made his election, the husband was bound by it.

Geoffrey Howe for the wife. The Divisional Court ought not to have ordered a rehearing or, if they did, they ought to have

ordered the husband to stand on his election that he had already made. *Yuill* v. *Yuill* [1] shows that there can never be a rehearing where a party has been put to his election. The State has an interest in there being an end to litigation: see Lord Greene M.R.'s judgment in *Laurie* v. *Raglan Building Co. Ltd.*[2] [Reference was made to *Horton* v. *Horton* [3] and *Sims* v. *James Grose Ltd.*[4]] Election precludes a new trial: *Alexander* v. *Rayson.*[5] This principle applies in the Divorce Division: *Yuill* v. *Yuill* [6]; *Beal* v. *Beal* (*Reade cited*) [7]; *Gilbert* v. *Gilbert & Abdon* (*Adams intervening*) [8]; *Lance* v. *Lance & Gardiner* [9] and *Wilson* v. *Wilson.*[10] Thus it applies to appeals in the Divorce Division from magistrates' courts: *Goodwin* v. *Goodwin* [11] and *Baverstock* v. *Baverstock.*[12]

It may be that a distinction must be drawn between a submission that there is no case to answer as a matter of law and a submission that the complainant's case should be rejected on the merits: *Tann* v. *Tann* [13]; and see Rayden on Divorce, 8th ed., p. 923. Where an advocate is making the second type of submission, the court, while it has a discretion in the matter, should, as a matter of practice, put him to his election. Once a party has elected, he stands or falls by it so as to exclude the possibility of a new trial; "there can be no question of a new trial": Lord Greene M.R. in *Laurie* v. *Raglan Building Co. Ltd.*[14] If necessary, the case can be remitted to the justices for further findings of fact.

Alan Trapnell for the husband. Reliance is placed on the justices' reasons. They said that the wife's evidence was not satisfactory enough to find her charges proved. *Laurie* v. *Raglan Building Co. Ltd.*[15] is the only case which says that there cannot be a retrial. That case, like *Parry* v. *Aluminium Corporation Ltd.*,[16] was a case in negligence. Here a matter of status is involved. Where there is insufficient material for an appellate

[1] [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183, C.A.
[2] [1942] 1 K.B. 152, 153; [1941] 3 All E.R. 332, 334, C.A.
[3] [1960] 1 W.L.R. 987; [1960] 1 All E.R. 503.
[4] [1940] W.N. 63; 56 T.L.R. 377, C.A.
[5] [1936] 1 K.B. 169; 52 T.L.R. 131, C.A.
[6] [1945] P. 15.
[7] [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1228n.
[8] [1958] P. 131; [1958] 2 W.L.R. 8; [1957] 3 All E.R. 604.
[9] [1958] P. 134n.; [1958] 2 W.L.R. 316n.; [1958] 1 All E.R. 388n.
[10] [1958] 1 W.L.R. 1090; [1958] 3 All E.R. 195.
[11] [1947] W.N. 28, D.C.
[12] [1951] W.N. 104, D.C.
[13] Unreported, January 28, 1958.
[14] [1942] 1 K.B. 152, 156.
[15] [1942] 1 K.B. 152.
[16] [1940] W.N. 44.

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court to make up its mind, the court must be able to order a retrial.

Geoffrey Howe in reply. In *Goodwin* v. *Goodwin*,[17] *Baverstock* v. *Baverstock* [18] and *Tann* v. *Tann* [19] the concept of election was treated as being binding. The husband is bound by the election which he made.

Cur. adv. vult.

July 28. HODSON L.J. The judgment of the court will be delivered by Ormerod L.J.

ORMEROD L.J. stated the facts and continued: The Divisional Court having ordered a rehearing has in effect released the husband from his election and the wife has appealed to this court contending that the Divisional Court was wrong to order a rehearing having but two alternatives in allowing the appeal, that is to say, to make an order on one or other of the grounds put forward by the wife or to remit the case to the justices for further findings of fact. To send a case of this character back for further findings in the light of the directions given by the Divisional Court would, we think, be likely to be a fruitless exercise, since the justices could hardly be expected to have a sufficient recollection of the case to be able to dissect the wife's evidence into parts which could be classified as credible and incredible.

It would seem, therefore, that the only way in which justice can be done between the parties must be by retrial, and, this being the situation, unless the court is compelled by law to allow the appeal it would seem that the course taken by the Divisional Court must necessarily be right.

The first submission made on behalf of the wife was that once the Divisional Court had decided that the justices were wrong in finding that there was no case to answer, an order should have been made in her favour on the ground of the husband's persistent cruelty. The Divisional Court was of the opinion that the only satisfactory way of dealing with the case was to send it back for rehearing by a fresh panel of magistrates. In his judgment, Lord Merriman P. says: " I am quite satisfied, " not having seen or heard the witnesses, that we are incompe- " tent to express any view as to how much and in what particular " detail the evidence should have been accepted or rejected as

[17] [1947] W.N. 28, D.C.
[18] [1951] W.N. 104, D.C.
[19] Unreported, January 28, 1958.

"given by the wife or her witnesses." And later, after citing a passage in the justices' reasons, he says: "Taking that passage "alone it leaves us in complete doubt as to what extent they "did accept the wife's evidence if they did not accept it in "full." It is unnecessary to go further into the reasons given by the justices, or to cite further from the President's judgment on this part of the case. The justices having come wrongly to the conclusion that there was no case to answer, it seems clear, as we have said, that justice could not be done between the parties without a rehearing, particularly as a finding that the charge of cruelty was plainly made out would be equal to saying to the wife that she could at once present a petition for divorce with the imprimatur of the Divisional Court.

The wife contends that there could be no rehearing because the husband submitted to the magistrates that there was no case to answer and elected to stand on his submission. In *Alexander* v. *Rayson*[1] this court expressed the view that the judge should not be asked to express an opinion until the evidence is completed, and in *Parry* v. *Aluminium Corporation Ltd.*,[2] a case where there was a submission of no case to answer but the defendant was not put to his election, Goddard L.J. said[3]: "in all these cases of "negligence . . . the judge should say . . . 'Do you elect to call no "'evidence?'" In *Laurie* v. *Raglan Building Co. Ltd.*[4] Lord Greene M.R., after pointing out that the defendant in that case must be deemed to have elected, said[5]: "That being so, there "can be no question of a new trial. The matter must be dealt "with on the evidence as it stands." The combined effect of these three cases appears to be that the proper procedure, if a submission of no case is made by the defendant in a negligence case, is to require him to elect whether to stand on his submission, and if he does so there cannot thereafter be a new trial. In *Yuill* v. *Yuill*[6] Lord Greene M.R. considered the practice and said[7]: "I will assume that it is a proper practice to follow in the "Divorce Division. It does not mean that counsel by submitting "no case ipso facto loses his right to call evidence if his submis-"sion fails. He only loses that right if he definitely elects to call "no evidence. He may make this election expressly or (as in

[1] [1936] 1 K.B. 169; 52 T.L.R. 131, C.A.
[2] [1940] W.N. 44; 56 T.L.R. 318, C.A.
[3] [1940] W.N. 44, 46.
[4] [1942] 1 K.B. 152; [1941] 3 All E.R. 332, C.A.
[5] [1942] 1 K.B. 152, 156.
[6] [1945] P. 15; 61 T.L.R. 176; [1945] 1 All E.R. 183, C.A.
[7] [1945] P. 15, 18.

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"*Laurie*" v. *Raglan Building Co. Ltd.*[8]) impliedly. The practice "which has been laid down amounts to no more than a direction "to the judge to put counsel who desires to make a submission "of no case to his election, and to refuse to rule unless counsel "elects to call no evidence. Where counsel has so elected he is, "of course, bound: but if for any reason, be it through oversight "or (as here) through a misapprehension as to the nature of "counsel's argument, the judge does not put counsel to his elec- "tion, and no election in fact takes place, counsel is entitled to "call his evidence just if he had never made the submission." In *Wilson* v. *Wilson*[9] Karminski J. held that it was the established practice of the Divorce Division, other than in exceptional circumstances, that a party making such a submission must be put to his election.

There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged. *Laurie* v. *Raglan Building Co. Ltd.*[10] was a clear case of the former, *Yuill* v. *Yuill*[11] of the latter. In *Yuill* v. *Yuill*[11] Lord Greene M.R. said[12]: "In the court below, when his case was closed, counsel "for the respondent made a submission of no case—not, as I "understand, in the sense that the evidence led by the petitioner "was insufficient in law to support a decision in his favour, but "by way of an invitation to the learned judge to dismiss the "petition without calling on the respondent." There can, we think, be no doubt that in the former type of submission a defendant is bound by his election, and there can be no new trial. This rule, in our opinion, however, does not of necessity apply to the second type of case where the judge is invited to dismiss the case because of the unsatisfactory or unreliable nature of the evidence. In some cases it may well be that the appellate court will be able to decide the case without sending it back, but in others, and this, in our judgment, is certainly one, justice could not be done without a rehearing. There was no election in *Yuill* v. *Yuill*,[13] and it was unnecessary in any event to consider the

[8] [1942] 1 K.B. 152.
[9] [1958] 1 W.L.R. 1090; [1958] 3 All E.R. 195.
[10] [1942] 1 K.B. 152.
[11] [1945] P. 15.
[12] Ibid. 17.
[13] [1945] P. 15.

question of a new trial, and, therefore, the question of an election being binding did not arise. In our opinion, if the submission of no case is based on the unsatisfactory or unreliable nature of the evidence led by the plaintiff, and the appellate court finds itself unable on the findings of the court below to come to a just conclusion, the only course to be adopted in the interests of justice is to order a new trial, even if the defendant has elected to stand on his submission.

It was further submitted on behalf of the wife that even if there should be a new trial, the husband should nonetheless be bound by his election and should not be allowed to give evidence. This proposition is quite untenable. If there is to be a rehearing the wife may well put her case differently, or call further evidence, and the husband cannot be denied the opportunity of giving in evidence his version of the events in question.

It follows from the above that we would dismiss the appeal. The President took the view, both in this case and in the later case of *Horton* v. *Horton*,[14] that questions of this kind should be considered on a different basis from other cases as the question of status and, therefore, of public interest was involved. We agree with the view expressed by the President in *Ramsden* v. *Ramsden*,[15] and in other cases, that it is better in matrimonial disputes for the justices to hear both sides before coming to a decision, particularly as a finding by them of desertion or persistent cruelty may form the basis for a subsequent petition for divorce. On the other hand, the practice of putting a respondent to his election appears to have been adopted in the Divorce Court since *Alexander* v. *Rayson* [16] was decided. There is always a discretion remaining in the tribunal which would, no doubt, have the question of status well in mind in considering the exercise of that discretion. Subject to this qualification, we see no reason why the practice in divorce cases should not be in line with that in other cases.

Appeal dismissed, with costs limited to £1. Liberty to apply.

Solicitors: *Carter & Barber for Ewing, Hickman & Clark, Southampton; Watkins, Pulleyn & Ellison for Bernard Chill & Axtell, Southampton.*

[14] [1960] 1 W.L.R. 987; [1960] 1 All E.R. 503.

[15] [1954] 1 W.L.R. 1105; [1954] 2 All E.R. 623, D.C.

[16] [1936] 1 K.B. 169.

1960
June 21, 22.

Lord Merriman P. and Marshall J.

C. A.

1961
Feb. 9, 10.

Holroyd Pearce, Harman and Davies L.JJ.

SOWA *v.* SOWA.

Husband and Wife—Maintenance—Justices—Jurisdiction—Potentially polygamous marriage.

Husband and Wife — Marriage — Polygamous marriage system — Inapplicability of English matrimonial law—Justices—Maintenance application.

A polygamous marriage does not come within the word "marriage," nor do the parties to it come within the words "wife," "married woman" or "husband" for the purposes of the Matrimonial Causes Acts or the Summary Jurisdiction Acts relating to matrimonial matters; for the purpose of enabling relief to be granted no distinction could be drawn between (a) the High Court jurisdiction and summary jurisdiction, or (b) polygamous marriages and those which though potentially polygamous are de facto monogamous.

Where, therefore, a woman who had entered into a potentially polygamous marriage in Ghana applied to a magistrates' court for a maintenance order against the man on the grounds of desertion:—

Held, that as the parties to a polygamous marriage were not entitled to the remedies or relief of the matrimonial law of England, the woman was not entitled to a maintenance order.

Hyde v. *Hyde and Woodmansee* (1866) L.R. 1 P. & M. 130 applied.

Decision of Divisional Court, post, p. 71; [1960] 3 W.L.R. 733; [1960] 3 All E.R. 196 affirmed.

Appeal from the Liverpool stipendiary magistrate.

The parties were natives of, and domiciled in, Ghana. They were both members of the tribe of Ga. In September, 1955, the husband became engaged to the wife in Ghana, and presented her with a ring and a Bible, which symbolised an intention on his part to convert a marriage which by tribal custom was potentially polygamous into a Christian, and therefore monogamous, marriage. In October, 1955, the husband left Ghana for England. In November, 1955, a marriage by proxy according to the customs of the tribe of Ga, was performed; it was a valid marriage. In January, 1956, the wife came to England and lived with the husband in Liverpool. From that time, the wife made many requests to the husband to convert the marriage into a Christian and monogamous one but those requests were all refused. On November 1, 1958, the wife left the husband. Thereafter, she made a complaint to the Liverpool magistrates' court that the husband had deserted her. That complaint was found proved, the

[Reported by D. R. Ellison, Esq., Barrister-at-Law.]

wife was granted the custody of the child and the husband was ordered to pay £4 10s. a week for the wife and 30s. a week for the child. The husband appealed against that order.

R. Z. H. Montgomery for the husband. The powers of a magistrates' court to make a separation or maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, apply only where there exists between the parties a marriage as that term is understood in our law, that is, where the marriage is monogamous. This marriage was polygamous, or potentially polygamous. It could therefore confer no right upon either party to the relief of our matrimonial law. *Hyde* v. *Hyde and Woodmansee* [1] is relied on.

W. G. O. Morgan for the wife. This marriage, although potentially polygamous, was also potentially monogamous, and would have become monogamous but for the default of the husband in not fulfilling his solemn promise to the wife. Even though our courts would not decree a dissolution of this marriage, it does not follow that the marriage is entirely without effect in the eyes of English law. Reliance is placed on *Srini Vasan* (*orse. Clayton*) v. *Srini Vasan*,[2] *Baindail* (*orse. Lawson*) v. *Baindail* [3] and *Risk* (*orse. Yerburgh*) v. *Risk*.[4] Since the ceremony of marriage was valid by the lex loci celebrationis, it is valid by English law. The appellant is therefore a married woman and should be so regarded for the purposes of the Summary Jurisdiction (Married Women) Act, 1895.

LORD MERRIMAN P. I have most regretfully come to the conclusion that we have no option but to set aside this order. I say regretfully, because the point on which this case falls to be decided was by common submission never put before the magistrate at all. However, it has been put before us, and we have to decide it as a matter of law. I also say regretfully, because the husband in question has, in my opinion, no sort of merits whatever. He has behaved, I think (and as the magistrate thought), in a most insincere and disgraceful manner towards the complainant woman.

I must, however, go to some extent into the facts, and let me say at once that I cannot find any criticism whatever in

[1] (1866) L.R. 1 P. & M. 130.
[2] [1946] P. 67; 61 T.L.R. 415; [1945] 2 All E.R. 21.
[3] [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A.
[4] [1951] P. 50; 66 T.L.R. (Pt. 2) 918; [1950] 2 All E.R. 973.

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the facts found by the magistrate, who heard the case most carefully, and, I think, has made an unimpeachable statement of the facts.

The primary fact in this case is that these two persons, whom I will now call, without prejudice, the husband and the wife, are domiciled Ghanaians. In September, 1955, the parties became engaged to be married, and in October, 1955, the husband returned to Liverpool, where, apparently, he already owned a house, and, so far as I know, had previously been employed. He plainly left Ghana under promise of marriage, and, indeed, in November, 1955, there was a ceremony of marriage by proxy. We have been told no more about that than that it is plainly legal under the law of Ghana, and we have not thought it necessary to investigate that question. Before I go further I wish to point out that before he left Ghana for Liverpool, the husband had given the wife a ring and a Bible. The significance of that is proved, and the evidence was accepted by the stipendiary, quite rightly in my opinion, that that amounted to a promise that the ceremony of marriage according to the law of Ghana, or, more particularly, the law of the tribe of which they are both members, which is unquestionably potentially polygamous, could be converted into a monogamous marriage, either in a church or before a registrar, and provision is made in section 44 of an Ordinance of Ghana of 1884, chapter 127, to that effect. I do not want to go into unnecessary detail, because there is really no dispute about this—that this promise was made with the intention that this marriage should be turned from a potentially polygamous into a monogamous one, and that the wife went through the ceremony by proxy under the belief that faith would be kept in that respect. It has not been kept, and the husband has, through his solicitors, rejected her demand that that promise should be kept. To use his words, he does not regard any further ceremony as being necessary, but, in fact, as quite superfluous. I am referring to a letter of June 1, 1959, written by his solicitors to her solicitors, and ending with these words: "He is there-" fore not prepared to pander to a suggestion on the part of your " client which he regards as fatuous and completely whimsical." I regard that as the lowest possible form of deceit on his part. There is nothing whimsical or fatuous about it. It was a promise which, if properly carried out, would have had effect under the ordinance to which I have referred.

However, the fact is that that change in the nature of the marriage has never been effected, from which it follows that it

comes within the class of case dealt with in *Hyde* v. *Hyde and Woodmansee*,[1] decided in the very early days of the Divorce Court by Lord Penzance. The headnote reads: "Marriage as understood in Christendom is the voluntary union for life of one man "and one woman, to the exclusion of all others. A marriage "contracted in a country where polygamy is lawful, between a "man and a woman who profess a faith which allows polygamy, "is not a marriage as understood in Christendom; and although "it is a valid marriage by the lex loci, and at the time when "it was contracted both the man and the woman were single "and competent to contract marriage, the English Matrimonial "Court will not recognise it as a valid marriage in a suit instituted by one of the parties against the other for the purpose "of enforcing matrimonial duties, or obtaining relief for a breach "of matrimonial obligations." This was a petition by a husband for dissolution of marriage on the ground of adultery. Lord Penzance said[2]: "In conformity with these views the court "must reject the prayer of this petition, but I may take the "occasion of here observing that this decision is confined to that "object. This court does not profess to decide upon the rights "of succession or legitimacy which it might be proper to accord "to the issue of the polygamous unions, nor upon the rights or "obligations in relation to third persons which people living "under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as "between each other they are not entitled to the remedies, "the adjudication, or the relief of the matrimonial law of "England."

That the present case was covered by that pronouncement was never argued before the stipendiary, and that that is so is plainly borne out by the concluding passage in his reasons. After finding that the defendant had no grounds for refusing to take his wife back, he said: "I find that a valid marriage subsists "between the complainant and the defendant and that the "defendant deserted the complainant as from July 10, 1959."

There was evidence that this was a perfectly valid marriage in Ghana, and, as I have already said, there was evidence that it could be converted into a perfectly valid marriage in England. But the point that, for the purposes of enforcement, this marriage was and always remained a potentially polygamous marriage, and, therefore, could not give rise to "the remedies,

[1] (1866) L.R. 1 P. & M. 130. [2] Ibid. 138.

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"the adjudication, or the relief of the matrimonial law of Eng-"land," was never put to the stipendiary at all.

I used some hard words about the husband's conduct because it does not merely depend on the point that he broke his promise to turn this into a monogamous marriage. It is worse than that. When he deserted this woman, and left her, as the stipendiary found, without any subsistence for herself and her child, after having paid her the pitiful sum of £2 10s. a week for some time after the birth of the child, she tried by some means or another to get some money out of him. Apparently she was frustrated because she was told that she could not produce a certificate of her marriage, and ultimately—whether the advice was good or bad she accepted it, and I am not surprised that she did—she brought affiliation proceedings against her husband, who appeared by a solicitor and defended the case on the ground that she could not satisfy the first requisite of a bastardy summons because she was not a single woman; on the contrary, she was married to him. Unfortunately, or fortunately, as the case may be, that issue never came to actual decision, for as soon as this point was raised the magistrates adjourned the case. I say unfortunately or fortunately because, of course, that relieves us of what might otherwise, in regard to what happened afterwards, have raised a question of estoppel per rem judicatam against the husband; but the matter was not adjudicated upon on that basis.

Then finally, under other advice, she took out this present complaint. The husband, again represented professionally, resisted this time on the ground that he was not married to her and that she had no right as a married woman at all, because this had been a potentially polygamous marriage. However right he may be in law, I venture to think that I have not been too harsh about his moral conduct in this context.

That brings me to the only point which I think calls for any doubt or hesitation on our part in this case. There is a string of cases beginning with *Srini Vasan* (*orse. Clayton*) v. *Srini Vasan*[3] and *Baindail* (*orse. Lawson*) v. *Baindail*,[4] both those cases being decided by Barnard J. The decision in *Baindail*, which Barnard J. founded avowedly on his own decision in *Srini Vasan*, went to the Court of Appeal presided over by Lord Greene M.R., and both decisions of Barnard J. were upheld. I do not think it is necessary to go into great detail about those

[3] [1946] P. 67; 61 T.L.R. 415; [1945] 2 All E.R. 21.

[4] [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A.

cases, because Barnard J. himself pointed out the distinction between them and the type of case covered by *Hyde* v. *Hyde and Woodmansee*,[5] in *Risk* (*orse. Yerburgh*) v. *Risk*,[6] where he said: "In *Srini Vasan* v. *Srini Vasan* and *Baindail* "v. *Baindail* all that the court decided was that a man "who was domiciled in a country which permitted polygamy, "and had contracted a valid polygamous marriage in that "country, had the status of a married man according to the law "of his domicile and was therefore incapable of contracting a "subsequent valid marriage in England; and in the latter case "Lord Greene M.R. referred to the passage which I have quoted "from Lord Penzance's judgment and stated that, rightly or "wrongly, the courts had refused to regard a polygamous "marriage as one which entitled the parties to come for matri-"monial relief to the courts of this country." It is unnecessary to say more than that that is the crucial issue in the present case. It is manifest that as soon as an attempt to obtain direct matrimonial relief in respect of a marriage which is potentially polygamous is in issue, the decision in *Hyde* v. *Hyde and Woodmansee* [7] is directly in point.

In none of those cases decided by Barnard J. and the Court of Appeal, on the other hand, was there any question of trying to obtain relief in respect of a marriage which was potentially polygamous. What was in question in those cases was whether anyone who had acquired such status as by his own personal law he did acquire as a married man in his own country could validly go through a monogamous form of marriage in this country, and they held that he could not, and that the result was that the other party to the marriage was entitled to a decree of nullity.

How, then, does the matter stand here? For this purpose I must refer to the foundation of the present jurisdiction of magistrates' courts in connection with these matrimonial, or, as they are sometimes called, domestic, proceedings. The Summary Jurisdiction (Married Women) Act, 1895, s. 4, begins with these words: "Any *married* woman whose *husband* shall "have been convicted [of certain forms of assault upon her] or "whose *husband* shall have deserted her, or whose *husband* shall "have been guilty of persistent cruelty to her, or wilful neglect "to provide reasonable maintenance for her or her infant

[5] L.R. 1 P. & M. 130.

[6] [1951] P. 50, 53; 66 T.L.R. (Pt. 2) 918; [1950] 2 All E.R. 973.

[7] L.R. 1 P. & M. 130.

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" children whom he is legally liable to maintain . . . " may make a complaint, and the complaint, if proved, gives power to the court under section 5 to make certain orders, the first of which is that " the applicant," that is the married woman, " (*a*) . . . be " no longer bound to cohabit with her *husband* (which provision " while in force shall have the effect . . . of a decree of judicial " separation on the ground of cruelty) "; and secondly, " (*b*) A " provision that the legal custody of any children of the *marriage* " between the applicant and her *husband*, while under the age of " sixteen years, be committed to the applicant "; and thirdly, the provision " (*c*) . . . that the *husband* shall pay to the appli- " cant personally, or for her use, to any officer of the court or " third person on her behalf, such weekly sum not exceeding [the " then maximum of] £2 as the court shall, having regard to the " means both of the *husband and wife*, consider reasonable." Twenty-five years later, that latter provision was supplemented by the Married Women (Maintenance) Act, 1920, s. 1, which made the provision that maintenance could be given in respect of any child of whom the wife was given the custody, and it extended the scope of the Act of 1895 as follows: " An order under section " 4 of the Summary Jurisdiction (Married Women) Act, 1895, " . . . made on the application of a *married* woman, which con- " tains a provision committing the legal custody of any children " of the *marriage* to the applicant, may, in addition to any other " provision authorised by the Act, include a provision that the " *husband* shall pay to the applicant . . . a weekly sum not " exceeding 10s. for the maintenance of each such child until " such child attains the age of sixteen years." These maximum sums have been altered by subsequent statute, but there is no point in referring to the details, for the maximum for the wife which is at present £5 will in all probability shortly become £7 10s., and the maintenance in respect of each child, which is now 30s., will also probably be increased in the near future.

But the whole thing is governed from first to last by this being a provision made in favour of a married woman against her husband, and in respect of people who can be described as children of the marriage. It is impossible, therefore, in my opinion, to resist the conclusion that, contrary to the concluding words of Lord Penzance's judgment in *Hyde* v. *Hyde and Woodmansee*,[8] this is an attempt as between each other to obtain " the remedies,

[8] L.R. 1 P. & M. 130, 138.

"the adjudication, or the relief of the matrimonial law of "England."

I know, of course, that at that time (1866) the magistrates' courts had no jurisdiction similar to that which they now enjoy. There was some provision in the Matrimonial Causes Act, 1857, about a wife's property in case of desertion which was in force at the time, and it is quite true that later on a remedy in respect of aggravated assault on the one hand and desertion on the other was added, together with the proviso against making any order in favour of an adulterous wife, and the rest of it, all of which eventually was embodied in the Act of 1895.

But the mere fact that Parliament has extended the matrimonial jurisdiction to magistrates' courts has, in my opinion, nothing whatever to do with the matter. It still is part of the matrimonial law of England, and those who are, and remain, as in the present case, only able to put forward a marriage of a potentially polygamous character are not, in my opinion, having regard to Lord Penzance's judgment, entitled to take advantage of the reliefs so provided.

In my opinion, but, as I repeat, very much to my regret, we have no option but to allow this appeal and set aside this order.

MARSHALL J. I agree, also with deep regret, for in my judgment the appeal in this case, apart from one legal point, is without any merits whatsoever.

The notice of motion sets forth the grounds of appeal under three heads: (1) that the said decision was wrong in law, (2) that the said decision was against the weight of evidence, and (3) that the appellant had not deserted the respondent as alleged by her or at all. It was conceded in the course of the argument by Mr. Montgomery that, having regard to the findings of the stipendiary magistrate, he was not prepared to continue to advance the second and third grounds as being valid, and the appeal ultimately came down entirely to the question of law which is raised by the first ground.

[His Lordship referred to the facts and continued:] After the wife left the husband on November 1, 1958, being destitute, she consulted the National Society for the Prevention of Cruelty to Children, and proceedings were at once taken under the Affiliation Proceedings Act, 1957, which, when the hearing began, was met with the defence put forward by the advocate for the husband that the wife was not a single woman, an essential requisite to

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being able to proceed under that Act. Accordingly, no adjudication was made.

But the wife, again under advice, took proceedings next under section 4 of the Summary Jurisdiction (Married Women) Act, 1895. The ground of opposition to her claim was then changed. Having argued before that she was not a single woman, but validly married to the husband according to the tribal custom, when the case came before the stipendiary, the point was taken that she was not validly married at all; not, be it made clear, the point that though the marriage was valid in Ghana according to tribal custom, being potentially polygamous it was not a marriage such as is recognised by the general marriage laws of this country; and the point not having been argued, and the stipendiary's attention not having been brought to the real issue in that form, it is not surprising that a decision was made, that the marriage was a valid one in Ghana.

It was against his order, made as I have already indicated, that this appeal was brought, and if it were possible by any proper legal rule to uphold this order, I should have upheld it with the greatest satisfaction. But it is not possible, having regard to the law which binds us. That law has been gone into in detail by my Lord. It stems primarily from *Hyde* v. *Hyde and Woodmansee* [9] in which, as my Lord has already indicated, Lord Penzance made it perfectly clear that a polygamous marriage is not recognised by the law of this country. He accordingly decided that as between the parties to such a marriage they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England. That decision has formed the foundation of subsequent decisions, three of which, at least, have been decided by Barnard J. Two cases only need be referred to. The first is *Baindail* (*orse. Lawson*) v. *Baindail*,[10] which went to the Court of Appeal, and it is only necessary to state that the extract which my Lord read from Lord Penzance's judgment in *Hyde* v. *Hyde and Woodmansee* [11] was specifically assented to by the Court of Appeal in that case. It therefore appears clear that this basic proposition is already underwritten by the decision of the Court of Appeal, and this court must clearly, therefore, be bound by it.

The other case to which I should make reference is one which I think clearly answers the argument that was primarily advanced,

[9] L.R. 1 P. & M. 130.
[10] [1946] P. 122.
[11] L.R. 1 P. & M. 130.

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with great discretion, by Mr. Morgan, who was left standing on a very narrow legal ridge indeed. It is *Risk* (*orse. Yerburgh*) v. *Risk*,[12] in which Barnard J. said: "If English law regards such "a polygamous marriage as the one now before me as no mar- "riage, it might seem at first sight that there could be no "objection to the court's saying so, for the decree would be "declaratory. But this would mean that a successful petitioner "would have the right to apply for maintenance and for custody; "it would also mean that if the present petitioning wife were the "second, third or fourth wife of the husband, the court would "still have to entertain her petition, for under Moslem law the "first wife is no more the wife than the remaining three. In the "case now before me, although the ceremony was in Arabic, a "language which the wife did not understand, I am satisfied that "she realised that it was a ceremony of marriage according to "Moslem rites, and that those rites permit of other wives. The "wife entered into this marriage contract with full knowledge of "its polygamous character, and now on that very ground she "seeks to have it set aside. On this aspect of the matter the "words of Lord Penzance in *Hyde* v. *Hyde and Woodmansee* "are very much to the point." Barnard J. there quotes from Lord Penzance's judgment from which my Lord has already quoted, and goes on: "Lord Penzance concluded his "judgment thus: 'All that is intended to be here decided is that "'as between each other they are not entitled to the remedies, "'the adjudication, or the relief of the matrimonial law of "'England.'" Lord Greene M.R. in *Baindail* v. *Baindail*[13] referred with approval to that passage. Although in *Hyde* v. *Hyde and Woodmansee* Lord Penzance was concerned with a petition for dissolution, I feel satisfied that he advisedly used the word adjudication.

The final argument put forward by Mr. Morgan, as I understand it, was that whereas these decisions applied to the administration of the law in the High Court, they did not apply with that same strictness to matters coming before magistrates under the Act of 1895, and that it is possible for us to regard as a married woman for the purposes of that Act any woman married in a valid sense, whether the marriage was polygamous or monogamous. Again, I would have liked to be able to accede to that argument, but I am quite satisfied that all that the Summary Jurisdiction (Married Women) Act, 1895, did was to enable a cheaper

[12] [1951] P. 50, 53.

[13] [1946] P. 122, 126.

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process to be available to parties who are married, and to enable the magistrates to adjudicate, but they involve the same rights, responsibilities and liabilities as are involved in the administration of the general divorce law in the High Court.

Finally, I will mention *Mehta (orse. Kohn)* v. *Mehta.*[14] Suffice it to say that what was found, and adjudicated upon, in that case was a marriage that was monogamous in its inception, and a marriage that could only become polygamous on the happening of certain events, which events never did occur.

I agree that this appeal should be allowed.

LORD MERRIMAN P. Then the result is that the appeal is allowed, and the magistrate's order set aside. We give leave to appeal to the Court of Appeal, because this is such an important question that it is one which ought to be decided in the Court of Appeal. And I say that for this additional reason, without going back on anything I have already said: if the same law does not apply in matrimonial issues in magistrates' courts as applies in the High Court we should arrive at the absurd position that in a cruelty case the next day a petition could be brought for divorce, and in a desertion case after three years a petition could be brought for divorce on the ground of desertion supported by magistrates' court orders made in the jurisdiction which would be peculiar to them, though denied to the Divorce Court.

Appeal allowed.
Leave to appeal.

The wife appealed.

J. S. Watson Q.C. and *W. G. O. Morgan* for the wife. The decision of Lord Penzance in *Hyde* v. *Hyde and Woodmansee*,[1] on which the Divisional Court based their decision, can be distinguished from the present case on the ground that it was based on the intention of the parties that the marriage (a Mormon one) should be polygamous, whereas in the present case it was the clear intention of the parties that the marriage should be monogamous. Even if *Hyde* v. *Hyde* [1] prevented the Divorce Division of the High Court from recognising as a valid marriage a potentially polygamous marriage which was in fact monogamous, that decision is not applicable to summary proceedings in magistrates' courts because at the time of *Hyde* v. *Hyde* [1] magistrates had no jurisdiction to deal with matrimonial proceedings.

[14] [1945] 2 All E.R. 690.

[1] (1866) L.R. 1 P. & M. 130.

It is conceded that the parties in the present case have not been monogamously married, but it is submitted that "marriage" cannot be restricted to a monogamous ceremony, but should include a marriage which is de facto monogamous although potentially polygamous. Although the accepted view is that the quality of a marriage depends on the nature of the ceremony, it is suggested that it can also depend on the agreement of the parties. In the present case the parties always intended that the marriage should remain monogamous, and, accordingly, it is submitted that they have not been polygamously married and that their marriage is one which the courts should recognise.

The Matrimonial Causes Acts refer to "husband," "wife" and "marriage," whereas the Summary Jurisdiction Acts refer to "any married woman." It follows that the ambit of the Summary Jurisdiction Acts is wider than that of the Matrimonial Causes Acts, and the words "any married woman" are sufficient to include a woman who is a party to a potentially polygamous marriage which is de facto monogamous.

The Privy Council recognises the legal consequences flowing from a polygamous marriage with regard to legitimacy and succession: *Khoo Hooi Leong* v. *Khoo Chong Yeok* [2] and *Bamgbose* v. *Daniel*.[3] The authorities further establish that a polygamous marriage which is recognised by the law of the country where the marriage was celebrated between persons domiciled there is recognised in England to render null a subsequent marriage in England where the first wife is alive and not divorced: *Srini Vasan* (*orse. Clayton*) v. *Srini Vasan* [4] and *Baindail* (*orse. Lawson*) v. *Baindail*.[5] [Reference was made to *Mehta* (*orse. Kohn*) v. *Mehta*.[6]]

Since polygamous marriages have been recognised in legitimacy and succession cases and in cases involving a second marriage in this country, such marriages should be recognised to enable people residing here to obtain matrimonial relief in courts of summary jurisdiction. A marriage which is performed outside the United Kingdom under a law which permits polygamy is treated for the purposes of family allowances and national insurance as a valid marriage as long as the authorities are satisfied that it is de facto monogamous: Family Allowances and National

[2] [1930] A.C. 346, P.C.

[3] [1955] A.C. 107; [1954] 3 W.L.R. 561; [1954] 3 All E.R. 263, P.C.

[4] [1946] P. 67; 61 T.L.R. 415; [1945] 2 All E.R. 21.

[5] [1946] P. 122; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A.

[6] [1945] 2 All E.R. 690.

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Insurance Act, 1956, s. 3. Since Parliament has recognised a marriage which is de facto monogamous, although potentially polygamous, the courts should follow suit and recognise, at least for the purposes of summary relief, a marriage which they are satisfied has at all times been monogamous.

Only a marriage which is in fact polygamous should be included in Lord Penzance's rule in *Hyde* v. *Hyde*.[7] In any event the principle in that case should be restricted to enable the enforcement by courts of summary jurisdiction of matrimonial duties and matrimonial relief. It is conceded that the High Court would not have power to grant a divorce in the case of a potentially polygamous marriage because that would involve a change of status. For present purposes it is also conceded that the maintenance order would be invalid if the present husband married another woman.

Morgan followed.

R. Z. H. Montgomery, for the husband, was not called upon.

HOLROYD PEARCE L.J. This is an appeal from the Divisional Court of the Probate Divorce and Admiralty Division. That court set aside a maintenance order made by the Liverpool stipendiary magistrate on the ground of the husband's desertion. It took the view that an appeal to this court was desirable owing to the general importance of the matter, and not because of any doubt that it felt.

The merits are entirely on the wife's side. The husband has behaved so badly that I fully share the regrets expressed by the Divisional Court at finding itself unable to uphold the magistrate's order. One is inclined to echo the words of Crew C.J. in the case of the Earldom of Oxford [1] when he said that there was none but would "take hold of a twig or twine-thread to uphold it." Unfortunately the point taken by the husband which goes to jurisdiction seems to me unassailable; and I cannot but agree with the clear judgment of the President, which is founded on a vast experience of such matters.

The wife and husband are inhabitants of Ghana, and are domiciled there. They went through a tribal customary ceremony of marriage which is potentially polygamous. The husband had promised the wife that he would go through a further ceremony of marriage which would by the laws of Ghana convert the

[7] L.R. 1 P. & M. 130.

[1] *Willoughby of Eresby & Oxford (Earl) Case* (1625) W.Jones 96, 101, H.L.

potentially polygamous marriage into a monogamous or Christian marriage. He declined to carry out his promise. Therefore, although neither of the parties has in fact ever taken another spouse, and the husband admitted on oath in court that she was his wife, the only tie that binds them is a potentially polygamous marriage.

In *Hyde* v. *Hyde and Woodmansee* [2] Lord Penzance held that such a marriage (in that case a Mormon marriage) although it was a valid marriage by the lex loci, and at the time the man and woman were single, would not be recognised by the English matrimonial court as a valid marriage in a suit instituted by one of the parties against the other for the purposes of enforcing matrimonial duties or obtaining relief for a breach of matrimonial obligations. He accepted that for various other purposes the courts might take a different view, and concluded in these words [3]: "This court does not profess to decide upon the rights "of succession or legitimacy which it might be proper to accord "to the issue of the polygamous unions, nor upon the rights or "obligations in relation to third persons which people living under "the sanction of such unions may have created for themselves. "All that is intended to be here decided is that as between each "other they are not entitled to the remedies, the adjudication, "or the relief of the matrimonial law of England."

The Judge Ordinary [4] supported that conclusion by careful and sound reasoning. He said: "the matrimonial law of this country "is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the "rights and obligations which the contract of marriage has, by "the common understanding of the parties, created." He deals with the various remedies and shows that they are inapplicable to polygamous marriage. "If, then," he says, "the provisions "adapted to our matrimonial system are not applicable to such "a union as the present, is there any other to which the court "can resort? We have in England no law framed on the scale "of polygamy, or adjusted to its requirements." He rejects an argument which has been suggested in the present case also that the court would be justified in treating the first union as a Christian marriage, and all subsequent unions as void. He points to the startling inconsistencies that would flow from such a doctrine.

I find the reasoning of *Hyde* v. *Hyde* [5] inescapable. It has

[2] (1866) L.R. 1 P. & M. 130.
[3] Ibid. 138.
[4] Ibid. 135.
[5] L.R. 1 P. & M. 130.

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been approved in this court in *Baindail* (*orse. Lawson*) v. *Baindail* [6] where Lord Greene M.R. said: "For the purpose of enforcing the rights of marriage, or for the purpose of dissolving a marriage it has always been accepted as the case, following Lord Penzance's decision, that the courts of this country exercising jurisdiction in matrimonial affairs do not and cannot give effect to, or dissolve, marriages which are not monogamous marriages. The word 'marriage' in the Matrimonial Causes Act, has to be construed for the purpose of ascertaining what the jurisdiction of the English courts is in these matters. The reasons are that the powers conferred on the courts for enforcing or dissolving a marriage tie are not adapted to any form of union between a man and a woman save a monogamous union." And he concluded [7]: "rightly or wrongly, the courts have refused to regard a polygamous marriage as one which entitles the parties to come for matrimonial relief to the courts of this country."

It was argued that since in 1866 at the date of the decision in *Hyde* v. *Hyde* [8] no matrimonial jurisdiction, similar to that which magistrates now have, existed, we should regard the summary matrimonial jurisdiction as not subject to the principle set out in *Hyde* v. *Hyde*.[8] But the observations of Lord Greene M.R.[9] above apply to matrimonial relief in general, and are clearly not intended to draw any distinction between the High Court and the magistrates' courts. Nor could such a distinction be supported by any logic or principle. The same difficulties would arise in the magistrates' courts in applying to polygamous unions, rights and remedies that are intended for and adapted to Christian marriages.

It is argued that for practical convenience the courts could and should deal with marriages which though potentially polygamous are in fact monogamous. But the fact that a marriage happens at the moment to consist only of two formerly single spouses is irrelevant and may be altered at any time by the husband taking another wife. A husband could always invalidate a pending summons simply by so doing. Such a situation would be incongruous and shows the undesirability of seeking to alter the principle on the ground of convenience in particular cases.

The essential question is what is the nature of the union, and

[6] [1946] P. 122, 125; 62 T.L.R. 263; [1946] 1 All E.R. 342, C.A.
[7] [1946] P. 122, 126.
[8] L.R. 1 P. & M. 130.
[9] [1946] P. 122, 125, 126.

what are the bonds and implications of the marriage ceremony in question. If the ceremony is polygamous then it does not come within the word "marriage" for the purposes of the Acts relating to matrimonial matters, nor do the parties to it come within the words "wife," "married woman" or "husband." I find it impossible to read "married woman" in the Summary Jurisdiction Acts as intended to have a wider meaning than the word "wife" in the Matrimonial Causes Acts, or to read "husband" in the former Acts as having a different meaning from "husband" in the latter Acts, or to interpret the marriage connoted in the former Acts by the words "married woman" as a wider or looser tie than that intended by the word "marriage" in the latter Acts. The fact that the Summary Jurisdiction Acts provide somewhat different relief on sometimes different grounds from the Matrimonial Causes Act is no ground for inferring that the former were not intended to be governed by the principle of *Hyde* v. *Hyde*.[10] Moreover, Parliament would, in the light of the decision in *Hyde* v. *Hyde*, have clearly expressed its intention that the principle of that case should not apply to the Summary Jurisdiction Acts had it so intended.

Mr. Watson referred to the Family Allowances and National Insurance Act, 1956, s. 3, whereby, for the purposes of family allowances, the authority may treat a marriage, performed outside the United Kingdom under a law which permits polygamy, as valid if and so long as the authority is satisfied that the marriage has in fact at all time been monogamous. That, it is said, shows that there is a real difference between polygamous marriages and marriages which, though potentially polygamous, are de facto monogamous. It is argued that we should by reason of that distinction allow the latter to be the subject of applications to courts of summary jurisdiction. I can see no justification for such a departure from principle. That section shows that the words "marriage," "wife" and "husband" had not theretofore been thought to cover a polygamous marriage, and Parliament, therefore, found it necessary to enact section 3 of the Act of 1956. Parliament could make, if it so desired, for courts of summary jurisdiction a provision similar to that enacted in respect of family allowances. It would, however, be attended by many obvious incongruities and difficulties.

Mr. Watson sought to obtain some help from *Baindail* v. *Baindail*,[11] but that case does not affect the present. It was there held that a party to a previous potentially polygamous marriage

[10] L.R. 1 P. & M. 130.

[11] [1946] P. 122.

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could not validly contract a subsequent Christian monogamous marriage, and that our Divorce Court would recognise the existence of the potentially polygamous marriage for the purpose of pronouncing a decree of nullity in respect of a subsequent Christian marriage. That decision does not touch this point. The recognition of the fact of the previous polygamous marriage is no recognition of it as a marriage suited to and within the matrimonial procedure and jurisdiction of our courts. It is merely the recognition of a fact disabling a party from entering into a later Christian marriage which as such was a proper subject for consideration and decree by the courts.

Two cases in the Privy Council—*Khoo Hooi Leong* v. *Khoo Chong Yeok* [12] and *Bamgbose* v. *Daniel* [13]—were relied on as showing that the courts have narrowed the principle in *Hyde* v. *Hyde*.[14] But those cases merely show that (as envisaged in *Hyde* v. *Hyde*) courts other than matrimonial may take account of polygamous marriages for the purpose of ascertaining such rights as those of succession. They do not affect the principle that our matrimonial courts will not deal with polygamous marriages as a subject for the exercise of their jurisdiction. *Mehta* (*orse. Kohn*) v. *Mehta* [15] provides no help. There the marriage in respect of which the court was prepared to consider granting a decree was monogamous. The fact that the husband might by a change of faith have possibly been able to take other wives did not make the marriage polygamous.

Although, like the Divisional Court, I have listened with every sympathy to the arguments put forward for the wife, I, too, find its conclusion inevitable. I would therefore dismiss the appeal.

HARMAN L.J. I agree, and for the reasons Pearce L.J. has given. It seems clear that the legislature takes the same view, hence section 3 of the Family Allowances and National Insurance Act, 1956, to which we have been referred. Whether the legislature would think it right to make a similar provision in regard to matrimonial proceedings is for them and not for us. Whether this complainant is without remedy of another sort again is not for us. I can only say that it seems that this husband did promise by the gift of a Bible and a ring to marry this woman in

[12] [1930] A.C. 346, P.C.
[13] [1955] A.C. 107; [1954] 3 W.L.R. 561; [1954] 3 All E.R. 263, P.C.
[14] L.R. 1 P. & M. 130.
[15] [1945] 2 All E.R. 690.

a Christian union; and if that was the contract which he made, and which he has not fulfilled, it may well be that her advisers might think it worth while to sue him for damages for breach of that contract. Whether in that way some justice can be wrung from him I do not presume here to pronounce. For the present I shall only concur in the dismissal of the lady's appeal.

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DAVIES L.J. I also agree.

Appeal dismissed.
No order as to costs.
Leave to appeal to House of Lords refused.

Solicitors: *Helder, Roberts & Co. for John A. Behn, Twyford & Reece, Liverpool; Michael Kramer & Co. for Canter, Levin & Mannheim, Liverpool.*

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Husband and Wife—Nullity—Approbation and sincerity—Incapacity of wife—Wife unwilling to have simple operation—Parties long resident together—Approbation not a discretionary bar if found—Delay.

The parties were married in 1947 and the husband presented his petition for nullity in March, 1959, alleging incapacity or wilful refusal. He had left the wife the previous month, and both before and after marriage they had indulged in an incomplete form of sexual intercourse due to the state of the hymen, the wife refusing a simple operation to remedy the defect. The wife relied upon approbation and delay:—

Held, (1) that in considering approbation the duty of the court was to apply the test laid down by the House of Lords in *G.* v. *M.* (1885) 10 App.Cas. 171, H.L. to all the circumstances of the case. If, having done that, the court concluded that it would be most inquitable and contrary to public policy to grant a divorce no residual discretion remains.

Observations of Sachs J. in *Scott* v. *Scott* (*orse. Fone*) [1959] P. 103n.; [1959] 2 W.L.R. 497; [1959] 1 All E.R. 531 not followed.

(2) That mere delay did not constitute approbation: the true approach was to regard delay, and the explanation for it, as part of the circumstances to be considered in deciding whether or not there had been approbation.

W. (*falsely called R.*) v. *R.* (1876) 1 P.D. 405 considered.

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(3) That, although the husband knew both the law and the facts some years before the parting, he never expressed himself as satisfied with the existing sexual relations; the wife had refused to have the simple operation carried out, and the husband, whose only fault had been that he had been patient, was entitled to a decree nisi of nullity.

DEFENDED PETITION FOR NULLITY.

The parties went through a ceremony of marriage in February, 1947, when the wife was 34 and the husband some eight years younger and a former Italian prisoner of war. Sexual intercourse was attempted on several occasions both before and after the marriage, but owing to the condition of the hymen this proved impossible unless a small stretching operation were performed. This the wife refused to have.

In 1952, the wife had a conversation with a priest, and told the husband that the priest had said that the marriage should be annulled. The husband advised recourse to a doctor first, and she saw a distinguished gynaecologist from time to time thereafter. In January, 1956, she had a hysterectomy, and the husband finally left her shortly before he presented his petition in March, 1959. It was suggested that the wife's private parts had been injured in an accident some time before the marriage, and probably in childhood.

Lloyd-Davies for the wife. The evidence shows that this husband has "taken advantages and derived benefits from the "matrimonial relation which it would be unfair and inequitable "to permit him . . . , after having received them, to treat as "if no such relation had ever existed": *per* Lord Selborne in *G.* v. *M.*[1] It shows also that he had sufficient knowledge of the law, as well as of the facts, some time before he finally separated from his wife, and in the circumstances he must be held to have approbated the marriage. [*W.* (*falsely called R.*) v. *R.*,[2] *Clifford* v. *Clifford*,[3] *Slater* v. *Slater*[4] and *W.* v. *W.*[5] were also referred to.]

Although the wife had not so far undergone the operation, she had expressed a willingness in her evidence to have it if her husband should return to her. Her offer should be held to have been a sincere one, and she cannot therefore be deemed

[1] (1885) 10 App.Cas. 171, 186.
[2] (1876) 1 P.D. 405.
[3] [1948] P. 187; 64 T.L.R. 209; [1948] 1 All E.R. 394.
[4] [1953] P. 235; [1952] 1 All E.R. 1343.
[5] [1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858.

"incapable" as was held upon the facts in *M.* v. *M.* (*orse. B.*),[6] but the husband's petition should be dismissed as in *S.* v. *S.* (*orse. C.*),[7] for the defect was one which could be remedied. [Reference was also made to *L.* v. *L.* (*falsely called W.*)[8] and *Morgan* v. *Morgan* (*orse. Ransom*).[9]]

Alan Bray and *Gerald Butler* for the husband. The evidence shows that the husband always hoped to be able to achieve complete penetration. He wanted the wife to have the necessary operation; but he could not insist on its being carried out, for that was a matter for the wife herself finally to decide. Her refusal to undergo the necessary operation made consummation a continuing impossibility, but she could not be compelled to submit to it. [*L.* v. *L.* (*falsely called W.*)[10] was referred to.]

Delay by itself does not constitute an absolute bar: see *Clifford* v. *Clifford*.[11] The vital question is whether there has been approbation. To apply the test laid down by Lord Watson in *G.* v. *M.*[12]: has there been on this husband's part "a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he . . . should be permitted to go on to challenge it with effect"? [Reference was also made to *W.* v. *W.*[13] and *Tindall* v. *Tindall*.[14]] The evidence shows that this husband never accepted the position, nor acquiesced in the incompleteness of their sexual relationships. It is, moreover, necessary, as was stressed in *W.* v. *W.*,[15] applying *G.* v. *M.*,[16] that for a spouse to approbate a marriage he must have had "a knowledge of the facts and of the law." This spouse was unaware of his position.

Should there have been, however, a measure of approbation on the husband's part, approbation is on the authority of *Scott* v. *Scott* (*orse. Fone*)[17] a discretionary bar, and he should in all the circumstances be granted relief.

Phillimore J. referred to the history of the marriage and continued: Having listened to the evidence of these two people I have no hesitation in preferring the evidence of the husband.

[6] [1957] P. 139; [1956] 3 W.L.R. 975; [1956] 3 All E.R. 769.
[7] [1956] P. 1; [1955] 2 W.L.R. 246; [1954] 3 All E.R. 736.
[8] (1882) 7 P.D. 16.
[9] [1959] P. 92; [1959] 2 W.L.R. 487; [1959] 1 All E.R. 539.
[10] 7 P.D. 16.
[11] [1948] P. 187.
[12] 10 App.Cas. 171, 197, 198.
[13] [1952] P. 152.
[14] [1953] P. 63; [1953] 2 W.L.R. 158; [1953] 1 All E.R. 139.
[15] [1952] P. 152, 157, 162, 165, 168.
[16] 10 App.Cas. 171, 186.
[17] [1959] P. 103n.; [1959] 2 W.L.R. 497; [1959] 1 All E.R. 531.

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I thought the wife emerged from cross-examination as a most untruthful woman. I formed the view that the husband was a truthful man not least by his admission of some experience of sexual intercourse before he met his wife. I am satisfied that he is a hard-working man who was anxious to do his best for his wife. He is a man of limited education and intelligence and it would have been strange in all the circumstances of this marriage if he had not been dominated by his wife. Although he had had sexual experience before his marriage to her I think he had little knowledge of sexual matters. I accept that he did not complain to his wife of the incomplete nature of their sexual life, but he was in fact never satisfied with it; he told me, and I accept, that he kept trying to effect penetration. He was, of course, made aware of her impediment before the marriage, as he himself admits, and in 1952 was told by his wife of the possibility of annulment after her interview with the priest. I accept that he was not anxious to have children, and that seems reasonable in the light of their circumstances, but I am entirely satisfied that he agreed with his wife when she said that she wanted them. His attitude in regard to the proposed operation was that he hoped his wife would have it but that it was not for him to urge her to do so. He agreed to it and paid the fees for her visit to the gynaecologist and did nothing at any time to discourage it. I have no doubt whatever that whether he assented to it or not the decision to defer the dilatation until after the hysterectomy was her decision. He left her because their failure to have proper sexual intercourse built up over the years a tension between them which resulted in quarrels and bitterness which finally removed any happiness. I have said that the wife is untruthful. She is a woman of education and of determined character. In all the circumstances of this marriage she wore the trousers and called the tune. Her case presented her in a somewhat unattractive light. Here was a woman of 34 of a good and wealthy family who, after a short acquaintance, was enjoying sexual relations with a prisoner-of-war eight years younger than herself, and then followed him to his native country. Having seen the circumstances of his family she agreed to marry him on his return to England where she was to provide the background of her family home and support—a prospect which must have seemed dazzling to him in the light of circumstances in Italy at this time.

Aware of her own physical impediment she did nothing to have it put right before the marriage and has done nothing since

despite advice from a succession of doctors and a distinguished priest. Her husband told me that after seeing the gynaecologist in 1952 she told him that he had said that unless she had an operation her marriage would not last ten years. But despite that advice and the relatively simple nature of the operation she has not had it. She has invented a series of excuses for her failure to undergo it, alleging falsely, as I am satisfied, that her husband would not co-operate with her on this subject. Yet knowing of the wrong she has done this man she clings to her marriage, emphasising through her counsel the benefits conferred on a man who was merely an illiterate and penniless Italian peasant. It is perhaps not surprising she has quarrelled with her family and that no member of it has appeared in court to support her.

This is a harsh and unattractive picture. For myself I think the truth lies deeper. This woman sustained an accident before her marriage which involved injury in the region of her private parts. It is, I think, probable that this occurred in childhood. I have little doubt that this has had some mental effect which I am not competent to assess but which has made any further interference with her private parts something from which she shrinks. I have no doubt that she is and always has been determined not to undergo this operation. Although in the early days of the marriage at any rate she was in love with her husband and has wanted to have children and to preserve her married life, and although well aware of the need for this operation if she was to do so, she has been unable to bring herself to undergo it.

I think that the husband was right when he said that she only underwent the hysterectomy because she was forced to do so by the pain caused by the fibroids.

In the witness-box she said that she was prepared to have the operation if her husband would return to her, and Mr. Lloyd-Davies has accordingly argued that she ought not to be found incapable of consummating this marriage since she is ready to have an operation which may cure her. In the ecclesiastical courts proof was required that incapacity was incurable by art or skill, and for many years an impediment has been treated as incurable if the party suffering it is not prepared to submit to the operation or cure necessary to remove it. Thus, in *L.* v. *L.* (*falsely called W.*),[1] where a wife was incapable but her incapacity might be cured by an operation which she refused to undergo,

[1] (1882) 7 P.D. 16.

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Sir James Hannen P. granted the husband a decree, observing [2] that "the court cannot compel her to submit and the man can "only be expected to take all reasonable steps to persuade her. "This he has done and she has distinctly refused."

In *M.* v. *M.*,[3] where a wife had known for some years that a dilatation operation was necessary if her marriage was to be consummated and had failed to undergo it, a suggestion was made at a late stage in the trial that it should be adjourned in order that the operation might be performed. Karminski J. refused any adjournment. In the present case no request for an adjournment was made. I am quite satisfied that the offer made by the wife was not genuine. She has no intention of undergoing this operation, she cannot be compelled to and she cannot bring herself to undergo it. Without it she is and must remain incapable of consummating her marriage.

This being the position, I turn to consider the allegation that this husband has approbated the marriage, and that there is, accordingly, a bar to the granting of a decree.

The test to be applied is that laid down by the House of Lords in *G.* v. *M.*[4] Lord Watson puts it as follows [5]: "in a suit for "nullity of marriage there may be facts and circumstances proved "which so plainly imply, on the part of the complaining spouse, "a recognition of the existence and validity of the marriage, as "to render it most inequitable and contrary to public policy that "he or she should be permitted to go on to challenge it with "effect." Lord Selborne said [6]: "there may be conduct on the "part of the person seeking this remedy which ought to estop "that person from having it; as, for instance, any act from which "the inference ought to be drawn that during the antecedent "time the party has, with a knowledge of the facts and of the "law approbated the marriage which he or she afterwards seeks "to get rid of, or has taken advantages and derived benefits from "the matrimonial relation which it would be unfair and inequit-"able to permit him or her, after having received them, to treat "as if no such relation had ever existed." Later on he speaks [7] of "a foundation of substantial justice, depending upon the acts "and conduct of the party sought to be barred."

The phrase "knowledge of the facts and the law" was

[2] 7 P.D. 16, 17.

[3] [1957] P. 139; [1956] 1 W.L.R. 975; [1956] 3 All E.R. 769.

[4] (1885) 10 App.Cas. 171, H.L.

[5] Ibid. 197.

[6] Ibid. 186.

[7] Ibid.

explained by Karminski J. in *Slater* v. *Slater*[8] in the following words: "As Jenkins L.J. pointed out in *W.* v. *W.*,[9] a complete "knowledge of the law is not required; it is an adequate know- "ledge. By that, if I may be bold enough to interpret the "adjective, is meant a knowledge of the injury or the grievance, "and the knowledge that the law provides a remedy to the injured "party."

In the course of argument I was referred to the judgment of Sachs J. in *Scott* v. *Scott* (*orse. Fone*),[10] in the course of which he seeks [11] to tabulate the principles to be applied in dealing with a defence of approbation. He concludes, inter alia: "If the "facts do constitute a bar, it is a discretionary and not an "absolute bar." I think that in so stating he was founding himself on the language of Bucknill L.J. in *Clifford* v. *Clifford*,[12] where Bucknill L.J. referred to the case as having "what may "be called a discretionary aspect." I confess I do not find this easy to follow. It is, I think, the duty of the court to apply the test as laid down by the House of Lords in *G.* v. *M.*[13] to all the circumstances of the case. If, having done this, the court concludes that it would be most inequitable and contrary to public policy to grant a decree I cannot think that any residual discretion remains.

Finally, counsel raised the element of delay. It is well established that mere delay does not constitute approbation. The true approach is, I think, to regard delay, and the explanation for it, as part of the circumstances to be considered in deciding whether or not there has been approbation. This was the approach of Sir Robert Phillimore in the well-known case of *W.* (*falsely called R.*) v. *R.*[14] This husband was, as he admits, told by his wife of her impediment before the marriage and of the simple operation required to remedy it. After his wife spoke to Monsignor Wall in 1952 she mentioned to the husband that he had spoken of annulment. He says he did not really appreciate the possibility of annulment until he read the article in Epoca in 1958. Whilst I have no doubt that he believes he did not know until 1958, and although I have little doubt that his knowledge of the meaning of annulment was somewhat imprecise, I am content to approach

[8] [1953] P. 235, 241; [1953] 1 All E.R. 246, C.A.

[9] [1952] P. 152; [1952] 1 T.L.R. 879; [1952] 1 All E.R. 858.

[10] [1959] P. 103; [1959] 2 W.L.R. 497; [1959] 1 All E.R. 531.

[11] [1959] P. 103, 108.

[12] [1948] P. 187; 64 T.L.R. 209; [1948] 1 All E.R. 394, C.A.

[13] 10 App.Cas. 171, H.L.

[14] (1876) 1 P.D. 405.

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this case on the basis that he must be taken to have known the facts and the law in 1952.

Is he then to be said to have approbated the marriage because he continued to live with his wife until February, 1959, and to enjoy a limited form of sexual relationship until some time in 1957? Whilst it is true that he did not complain and did not urge his wife to have the necessary operation, but left the initiative to her, I am quite satisfied that he never expressed himself as satisfied with their sexual relations, and showed himself at all times ready to co-operate with her when she spoke of having the operation and of having children.

This man has done his best towards his wife according to his ability. His only fault has been that he has been too patient, and has not sought to put pressure on his wife to undergo a minor operation which she has always known it was her duty and in her interest to undergo.

Looking at all the circumstances of this case, including the element of delay and the husband's explanation for it, I cannot find that it would be inequitable or unjust to grant a decree which will terminate this unhappy union and enable this man, if so minded, to marry a woman with whom he can enjoy a normal married life. For those reasons I grant a decree on the grounds of incapacity.

Solicitors: *Alec Woolf & Turk; Candler, Stannard & Co.*

J. B. G.

1960
July 20, 27.

Marshall J.

KELLY *v.* KELLY AND BROWN (WESTMINSTER BANK LTD. INTERVENING).

Husband and Wife—Divorce—Death of party—Costs—Costs against co-respondent—Death of petitioner before decree absolute or taxation—Liability of co-respondent to pay personal representatives—Meaning of "persons interested"—Attorneys and Solicitors Act, 1870 (33 *&* 34 *Vict. c.* 28), *s.* 19—*Law Reform (Miscellaneous Provisions) Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 41), *s.* 1 (1).

The petitioner died before a decree nisi on the ground of adultery had been made absolute and before an order for costs against the co-respondent had been taxed. It was submitted that with the abatement of the suit the order for costs abated with it and could not be enforced by the personal representatives:—

Held, that upon leave being given to the personal representatives

to intervene, they were entitled to an order that the costs be taxed and then to proceed to enforce it; for they were "persons interested" within the meaning of section 19 of the Attorneys and Solicitors Act, 1870,[1] and the order for costs, although it had not proceeded to taxation, was a cause of action within the meaning of section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934.[2]

Hawks v. *Hawks and Fenwick* (1876) 1 P.D. 137; dicta of Denning L.J. in *Sugden* v. *Sugden* [1957] P. 120, 134; [1957] 2 W.L.R. 210; [1957] 1 All E.R. 300, C.A.; *Richards* v. *Richards and Flockton* [1942] P. 68n.; 58 T.L.R. 142n. applied.

Maconochie v. *Maconochie* [1916] P. 326; 33 T.L.R. 50 distinguished.

SUMMONS adjourned into court.

On December 17, 1958, the husband filed a petition for the dissolution of his marriage on the ground of his wife's adultery with the co-respondent, and the prayer of the petition asked that the co-respondent be condemned in the costs of the suit.

Both the wife and the co-respondent filed answers denying that they had been guilty of the adultery alleged in the petition. The suit came on for hearing before Mr. Commissioner Flowers Q.C. on December 9 and 10, 1959. He found that the husband had sufficiently proved the contents of his petition and pronounced a decree nisi, and made an order condemning the co-respondent "in the costs incurred on behalf of the petitioner in this cause "and such further costs to be incurred on behalf of the petitioner "as the court shall direct to be costs in the cause, such costs "incurred and to be incurred to be taxed as between party and "party."

The husband died on January 9, 1960, before the decree nisi was made absolute, and on May 26, 1960, probate of the husband's will was granted to the Westminster Bank Ltd., who were the sole executors. No taxation of the husband's costs against the co-respondent had taken place prior to the husband's death.

The personal representatives of the deceased husband sought an order on summons in the following terms: "that, taxation

[1] Attorneys and Solicitors Act, 1870, s. 19: "Revival of order for "payment of costs.—Whenever any "decree or order shall have been "made for payment of costs in any "suit, and such suit shall afterwards "become abated, it shall be lawful "for any person interested under such "decree or order to revive such suit, "and thereupon to prosecute and en- "force such decree or order, and so "on from time to time as often as "any such abatement shall happen."

[2] Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1): "Subject "to the provisions of this section, on "the death of any person after the "commencement of this Act all "causes of action subsisting against "or vested in him shall survive "against, or, as the case may be, "for the benefit of, his estate."

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" of the petitioner's costs against the co-respondent pursuant to " the decree nisi herein dated December 10, 1959, should " proceed, notwithstanding that since the making thereof the " petitioner has died; and that such costs when taxed be certified " payable to Westminster Bank Ltd. the petitioner's personal " representatives." It further asked: " that the costs of and " occasioned by this application be paid by the co-respondent and " added to the costs to be taxed pursuant to the decree nisi."

It came before Mr. Registrar Forbes on July 1, 1960, who, seeing that it raised points upon which no direct decision had been yet given, referred it to a judge for hearing in open court.

As appears from the judgment, leave was given to the Westminster Bank Ltd. to intervene in the suit during the hearing

Victor Williams for the Westminster Bank Ltd., as sole executors named in the will of the deceased husband, applied for leave to intervene in the suit and submitted that, as an order for costs had been made, there was a " cause of action " within the meaning of section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, which survived against the co-respondent for the benefit of the deceased's husband's estate. He referred to the dictum of Denning L.J. in *Sugden* v. *Sugden*,[3] which is cited in the judgment, and to *Richards* v. *Richards and Flockton*.[4]

William Kee for the co-respondent. Upon the death of the petitioner before decree absolute the suit abates and there is no transmissible interest: *Stanhope* v. *Stanhope*.[5] The suit having abated, no application can be made to the court for a taxation of costs: *Maconochie* v. *Maconochie*.[6] The only exception to this rule is where there are funds already in court.[7]

The Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), provides for the survival, on the death of a person, of causes of action vested in him. A suit for dissolution of marriage, however, is not within the meaning of the expression " cause of " action," and, since there is no transmissible interest, neither the suit, nor any order for costs made in that suit, is capable of survival. The observations of Denning L.J. in *Sugden* v. *Sugden*[8] to the effect that a " cause of action " extended to a sum payable for costs under an order of the Divorce Court were obiter and should not be applied in the circumstances.

[3] [1957] P. 120, 134; [1957] 2 W.L.R. 210; [1957] 1 All E.R. 300, C.A.

[4] [1942] P. 68n.; 58 T.L.R. 142n.

[5] (1886) 11 P.D. 103; 2 T.L.R. 447.

[6] [1916] P. 326; 33 T.L.R. 50.

[7] [1916] P. 326, 328.

[8] [1957] P. 120, 134.

Hawks v. *Hawks and Fenwick*,[9] if rightly decided, is distinguishable in that the petitioner in that case had died after decree absolute and not, as in the present case, before such decree.

The Westminster Bank Ltd. have no locus standi, for the bank was not a party to the suit and, since the suit has now abated, it is too late for it to be joined as a party.

Cur. adv. vult.

MARSHALL J. stated the facts and continued: It is well settled that a marriage remains in existence until the making of the decree absolute is pronounced. The effect, therefore, of the husband's death before the making of a decree absolute was to put an end to a marriage which still subsisted; and the divorce suit which at the time of the death was still without a final judgment was thereby abated.

The argument of Mr. Kee, who appeared for the co-respondent, was that with the abating of the suit the order for costs against the co-respondent abated with it, and was no longer, on the facts of this case, enforceable against him. The argument is not one of any merit.

On the commissioner's findings the co-respondent's adultery with the wife must be taken to have caused the breakdown of this marriage. The husband, before his death, had incurred most, if not all, the costs necessary to prove the truth of the facts set out in his petition and to obtain a dissolution of his marriage. His estate has been diminished to the extent of such costs, and the commissioner has, with full knowledge of the facts, exercised his discretion in condemning the co-respondent in the costs of the suit.

But the law does not always underwrite the meritorious, nor always fail to support that which is without merit.

Had this been an action other than a matrimonial cause, I have little doubt that the issue would be covered by the terms of R.S.C., Ord. 17.[1] But in *Stanhope* v. *Stanhope*[2] and *Brydges* v. *Brydges and Wood*[3] the Court of Appeal have held that R.S.C., Ord. 17, does not apply to divorce proceedings, seeing that matrimonial relief is a purely personal cause of action, and is not a transmissible interest within the meaning of that order.

[9] (1876) 1 P.D. 137.

[1] "Change of parties by death, "etc."

[2] (1886) 11 P.D. 103; 2 T.L.R. 447, C.A.

[3] [1909] P. 187; 25 T.L.R. 505, C.A.

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In *Maconochie* v. *Maconochie* [4] Shearman J. held that he had no jurisdiction upon the death of a husband, a party in a consolidated matrimonial suit, to entertain an application against the legal personal representative of the deceased husband in respect of taxation and payment of the wife's costs of suit, where no taxation or order for security of those costs had been applied for or made by the wife against the husband during his lifetime. In the course of his judgment Shearman J. said [5]: "No authority "has been cited to show me that these proceedings, which are "founded on statute or rest upon the old ecclesiastical practice, "are not personal actions. The result then is that when one "of these parties dies the action abates: it comes to an end; "it is dead and done with. These personal actions then having "abated, no one can come to the court and make an application "in these actions. There is one exception to the rule, and that "is where there are already funds in court (*Brown* v. *Feeney* [6]). ". . . The result in the present instance being that the actions "have come to an end, the wife, the surviving party, cannot "bring anybody here to listen to her application for costs incurred "in these actions, and there is no power to make an order."

There is, however, on the facts one important difference between *Maconochie* v. *Maconochie* [7] and the case now before me. Whereas in *Maconochie* v. *Maconochie* [7] the suit had not proceeded to a stage where any order as to the costs had been sought or obtained from the court, in the present case the suit had been heard and an order made against the co-respondent to pay the petitioner's costs. Is the death of the petitioner before taxation of the costs and decree absolute a complete bar to any attempt to recover them for the benefit of his estate? I have come to the conclusion that it is not a complete bar, first of all because of a provision that still exists in the Attorneys and Solicitors Act, 1870. Most of the provisions of that Act have been repealed, but section 19 still stands. [His Lordship read the section and continued:] I know of no reason why I should not apply this section to the present case, and hold that the executor of the husband's estate "being a person interested" in the order made against the co-respondent in respect of the costs is entitled to an order that the costs be taxed and then proceed to enforce it.

This course was followed by the Judge Ordinary in *Hawks* v.

[4] [1916] P. 326; 33 T.L.R. 50.
[5] [1916] P. 326, 328.
[6] [1906] 1 K.B. 563; 22 T.L.R. 393, C.A.
[7] [1916] P. 326.

Hawks and Fenwick.[8] The facts in that case were somewhat different in that the petitioner died after the decree absolute, but before the costs had been taxed. But if the order for costs in that case was covered by this section, I see no reason in principle or on the facts why the order for costs in the present case is not equally covered. It is to be noted that towards the end of his judgment the Judge Ordinary said[9]: "This statute was passed "to remedy a difficulty which arose by reason that in the common "law courts a suit could not be revived for the purpose only of "enforcing an order for costs. The words of the statute are very "general, and I know no reason why they should be limited "in their operation or not made applicable to all Divisions of "the High Court. I shall therefore direct that the representative "of the petitioner be at liberty to enforce the order for costs made "against the co-respondent."

I think that there is a further ground for acceding to this application in the terms of section 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, the material part of which reads as follows: " . . . on the death of any person after the "commencement of this Act all causes of action . . . vested in "him shall survive . . . for the benefit of his estate."

Is an order for the payment of costs which has not proceeded to taxation a cause of action within this section? Apart from Stroud's Judicial Dictionary, in which a cause of action is defined as the entire set of circumstances giving rise to an enforceable claim, a definition which appears to me to cover an order for costs, there is authority for saying that it is within the above section.

In *Sugden* v. *Sugden*[10] Denning L.J., giving the first judgment of the Court of Appeal, referred to section 1 of the Law Reform (Miscellaneous Provisions) Act, 1934, and said: "The "section applies only to 'causes of action' which subsist against "the deceased at the time of his death. . . . 'Causes of action' "in the section means, I think, rights that can be enforced—or "liabilities that can be redressed—by legal proceedings in the "Queen's courts. These now survive against the estate of the "deceased person. 'Causes of action' are not, however, confined "to rights enforceable *by action*, strictly so called—that is by "action at law or in equity. They extend also to rights enforce-"able by proceedings in the Divorce Court, provided they are

[8] (1876) 1 P.D. 137.
[9] Ibid. 138.
[10] [1957] P. 120, 134; [1957] 2 W.L.R. 210; [1957] 1 All E.R. 300, C.A.

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"really rights and not mere hopes or contingencies. They "include, for instance, a sum payable for costs under an order "of the Divorce Court." Although this opinion was obiter it must nonetheless carry great weight. In *Dipple* v. *Dipple* [11] Hodson J. referred [12] to an unreported decision of his given in chambers in 1940 in *Richards* v. *Richards and Flockton*,[13] in which he made an order for the taxation of costs to proceed against the personal representative of a co-respondent who had died after decree, and continued: "The order for costs having "been made against the co-respondent in his lifetime there was, "I think, an enforceable claim against him which was kept alive "by the Law Reform Act."

If such an order for costs is kept alive against the estate of a person who has died it must, by the same token, be kept alive in favour of the estate of a person who has died.

A second point taken by Mr. Kee was that the Westminster Bank Ltd. could not be made parties to a suit for the dissolution of marriage and, accordingly, could not suceed in this summons in this suit which was abated.

Whilst it is true that the main suit is at an end, I have no doubt that this does not preclude applications in ancillary matters. There are numerous cases in which this had been done. I think that Mr. Kee was right in his contention that on any view the Westminster Bank Ltd. should have obtained leave to intervene in the cause before bringing this summons. But full notice of the application was given to the co-respondent and he was represented before me. It is, in the circumstances, a proper matter in which I should give Mr. Victor Williams leave for the bank to intervene and to amend the summons by adding them as parties.

I accordingly order that the order for costs made by Mr. Commissioner Flowers Q.C., dated December 10, 1959, be allowed to proceed to taxation, and the amount found to be due be paid to the Westminster Bank Ltd. as the personal representatives of the petitioner.

Order accordingly.
Leave to appeal.
Costs of summons payable by co-respondent.

Solicitors: *Forsyte, Kerman & Phillips; Miller, Parris & Cornwell.*

J. B. G.

[11] [1942] P. 65; 58 T.L.R. 141; [1942] 1 All E.R. 234.

[12] [1942] P. 65, 68.

[13] [1942] P. 68n.; 58 T.L.R. 142n.

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Ormerod, Willmer and Danckwerts L.JJ.

Husband and Wife—Desertion—Actual desertion—Separation by consent—Confession of adultery by wife—Wife leaves matrimonial home—Husband not displeased—Whether act of desertion or consensual.
Husband and Wife—Desertion—Termination—Resumption of married life—Husband's regular visits to wife—Sexual intercourse—Whether resumption of cohabitation—Whether desertion terminated.

In 1954, during a quarrel with her husband, a wife confessed that in 1945 she had committed adultery with her brother-in-law. Following her confession, the wife decided to leave the matrimonial home and made arrangements accordingly. She remained in the home for a fortnight after her confession, during which time the parties lived at arm's length, and then departed; the husband was not displeased by her leaving. Thereafter, the parties corresponded regularly, at first in bitter but later in very affectionate terms, and during the next two years the husband frequently visited the wife at week-ends, on one occasion staying for five days. The parties had sexual intercourse on a number of these visits. In 1955 there was a suggestion that the husband might obtain a house for the wife and the children, but nothing came of it. In 1957 they ceased to communicate with one another. On the husband's appeal from the dismissal of his petition for divorce based, inter alia, on desertion:—

Held, (1) that the original separation was not consensual, for the wife's confession of adultery, followed by her departure from the matrimonial home, amounted to an act of desertion (post, p. 107).

(2) But that that desertion had been terminated by the husband's course of conduct consisting in regular visits to and intercourse with the wife (which also condoned the adultery), such that the separation thereafter became consensual, and the husband had failed to discharge the onus on him of showing any subsequent desertion by the wife. Accordingly his petition must be dismissed (post, p. 109).

Baker v. *Baker* [1954] P. 33; [1953] 3 W.L.R. 857; [1953] 2 All E.R. 1199, D.C. applied.

Perry v. *Perry* [1952] P. 203; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076, C.A. distinguished.

Decision of Stevenson J. affirmed on different grounds.

Appeal from Stevenson J.

The following statement of facts is taken substantially from the judgment of Willmer L.J. The parties were married in 1932, and there were four children, two of whom had attained the age of 21. The marriage was never particularly happy, and there were intermittent quarrels between the parties. At one time the husband actually left the wife for a period of about three months.

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The parties continued living together until the war, when the wife was evacuated to Somerset, which was her own home county and where her own mother lived. Cohabitation between the parties was resumed shortly after the war.

Some time in August, 1954, the parties were having an argument, in the course of which the wife suddenly and quite spontaneously confessed that she had committed adultery with a brother of the husband on an occasion shortly after the end of the war—some time about the end of 1945. At the time when the wife made this confession the husband's brother (hereinafter called "the co-respondent") was staying in the matrimonial home. The husband immediately taxed the co-respondent with what his wife had told him, but the co-respondent denied that he had ever committed adultery with the wife.

Following her confession of adultery the wife said that she could not stay any longer with the husband, and proceeded to make arrangements to go away to Somerset to live with her mother, taking the children with her. In fact, she left about a fortnight later. During that fortnight, although the parties continued to live under the same roof, they were living very much at arm's length. The husband made no secret of the fact that he did not object to his wife's going. In fact, he seemed to have been glad that she had gone. The wife thereupon went off to Somerset and the husband continued living in London.

Thereafter, the parties corresponded fairly regularly. Some of the letters on either side were rather bitter, but later on they became much more friendly. At some time early in 1955, the husband made a number of visits to Somerset, staying with the wife and the children for week-ends. In this improved state of the relations between the parties there was some suggestion during 1955 that the husband might obtain a house for the wife and the children to live in, Ipswich being chosen on the ground that that was where the married daughter of the parties lived. It was not contemplated that the husband should himself go and live with the wife and the children at Ipswich, for his work kept him in London, but as Ipswich was nearer than Somerset the husband would have been able to visit his wife and family frequently. Nothing came of the suggestion, but the week-end visits to Somerset continued, and the parties slept together and had sexual intercourse on a number of occasions.

In the summer of 1955 the wife was in a poor state of mental health, having shown signs of mental instability before the parting actually took place. In September, 1955, she was admitted to a

mental hospital in Somerset, where she was a patient for about 10 days. Correspondence between the parties, which took place while she was actually in the mental hospital, had been preserved, and the upshot of it was that immediately she came out of the hospital in October, 1955, the husband paid her a more prolonged visit, staying for about five days. During this particular visit sexual intercourse between the parties undoubtedly took place.

Early in 1956, the wife obtained an offer of a house at Highbridge, in Somerset, from the local housing authority. The husband heard of that, and wrote a letter to the housing officer. It was rather an important letter, in that it threw some light on the husband's then state of mind. The letter was dated January 18, 1956, and read as follows: "I understand my wife has applied "for a house in Highbridge. In fairness to you, I feel you should "be fully conversant with my wife's position. Firstly, I believe "she is being ill-advised by someone against her better judgment. "Secondly, there is a great possibility of divorce proceedings "against my wife in the future, in which case I would be fully "justified in claiming my furniture and custody of my two "children. Incidentally, I have already made plans to house my "family up here in London. I understand your desire to help "and I do appreciate it very much." Then there was a postscript about responsibility for the wife's actions and debts. At that date—January, 1956—there were in fact no plans for housing the family in London.

The husband said that some time in 1956 he wrote to his wife inquiring whether she would be prepared to come and live in Battersea, where the eldest son of the marriage was about to set up a home; and the husband's evidence was that he thought he and his wife might resume cohabitation in London, sharing a house with their son. According to the husband, the wife replied saying that she certainly was not going to come back to London, adding something about "all that smog and fog." The wife denied that she had ever received any letter inviting her to live with the husband in Battersea, but said that if she had received such a letter she would have agreed to go, although she disliked London. Neither the letter which the husband said that he wrote nor the reply which he said he received from the wife had been preserved.

The husband said that after this Battersea offer he more or less had nothing further to do with his wife. The wife said that he continued his visits until well into 1957, and that acts of sexual intercourse continued on the occasions of these further visits.

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After the husband ceased visiting the wife there was no further communication between the parties.

On March 6, 1959, the husband petitioned for divorce on the grounds of his wife's alleged adultery and desertion, the husband's brother being cited as the co-respondent. There was no cross-prayer for relief by the wife.

Stevenson J. found that the charge of adultery was proved against the wife, she having made a confession of adultery and not having given evidence denying the charge. There being no other evidence of adultery apart from the wife's confession, the judge found that adultery was not proved against the co-respondent, and he was dismissed from the suit. The judge further found that the wife's adultery had been condoned by the husband, and that nothing occurred thereafter to revive it; that the original separation in the summer of 1954 was a consensual separation and continued so throughout; and that there had therefore been no desertion. The judge made no specific finding as to whether the husband wrote a letter inviting the wife to live with him in Battersea, or the alleged exchange of letters about that matter. The judge said: " There may well have been an inquiry: ' Do you " ' want to live in London, would you be willing to live in Batter- " ' sea? ' and a firm answer by the wife: ' No, I do not like " ' London.' " Stevenson J., on his findings that the adultery had been condoned and that there had never been any desertion, accordingly dismissed the petition. The husband appealed on the issue of desertion only.

K. Bruce Campbell for the husband. The judge was wrong in holding that the original departure of the wife was not an act of desertion. It was her confession of adultery that made the continuance of further married life impossible. The party responsible for the termination of married life is the party in desertion. A reasonable belief in the adultery of a spouse provides just cause for the other spouse leaving the matrimonial home: *Glenister* v. *Glenister*.[1] The principle of *Glenister*[1] was extended in *Baker* v. *Baker*,[2] where it was held that a spouse, who left the matrimonial home because of a reasonable belief in the other's adultery, not only had just cause for leaving but had been deserted by the other spouse. On the principle of *Baker* v. *Baker*,[2] if the husband had left because of the wife's confession, she would have been the deserting party; she is a fortiori the

[1] [1945] P. 30; [1945] 1 All E.R. 513.

[2] [1954] P. 33; [1953] 3 W.L.R. 857; [1953] 2 All E.R. 1199, D.C.

deserting party if, as happened here, she voluntarily leaves the matrimonial home after her confession.

The fact that the husband was glad she went cannot make any difference to her act of desertion. A degree of acquiescence in her desertion cannot change the quality of her separation. In *Beigan* v. *Beigan*[3] the wife was glad the husband left and she changed the locks of the matrimonial home, but that did not prevent his departure constituting desertion; nor did her warning words that if he went he would not come back affect his desertion. It is not a necessary ingredient of desertion that it should occur against the will of the deserted party, and desertion often occurs when it is not against the will of the other party. A husband might so ill-treat his wife that she leaves. He might not want her to go, and yet if she goes against his will because of his ill-treatment, that would be constructive desertion on his part. The position was thus stated by Buckley L.J. in *Harriman* v. *Harriman*[4]: "Desertion does not necessarily involve that the "wife desires her husband to remain with her. She may be "thankful that he has gone, but he may nevertheless have "deserted her."

In the present case the husband did not consent to his wife's behaviour, and no blame can attach to him if he lets his adulterous wife leave him. She behaved in an appalling fashion, made the continuation of married life impossible and voluntarily left the matrimonial home. The only inference on the evidence is that she deserted her husband.

Desertion, once it has started to run, can only be terminated by a resumption of cohabitation. There was nothing resembling a resumption of cohabitation in this case. The longest visit of the husband to the wife was for five days, but that occurred just after her return from hospital and while she was still ill. The husband felt obliged to look after her in her then state of health, and that in no way indicated an intent to resume cohabitation. In any event, where a wife deserts her husband, as this wife did, something more than week-end visits or even a five-day visit is necessary to constitute a resumption of cohabitation. There must be something to show that they are setting up a matrimonial home again. Unless there is a bilateral intention to set up a matrimonial home the desertion continues, and it is not affected by the visits of the husband to the wife or by the intercourse that

[3] [1956] P. 313; [1956] 3 W.L.R. 281; [1956] 2 All E.R. 630, C.A.

[4] [1909] P. 123, 148; 25 T.L.R. 291, C.A.

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they had on those visits: see *Mummery* v. *Mummery*[5] and *Perry* v. *Perry*.[6] The latter case clearly established that the concept of condonation was inapplicable to desertion and that intercourse, even if it results in the birth of a child, does not terminate desertion where it is not accompanied by a bilateral intention to set up a matrimonial home together. Neither spouse in the present case intended during the husband's visits to set up a matrimonial home.

The law favours reconciliation between estranged spouses, and therefore attempts at reconciliation do not attract any unfavourable legal consequences if they fail to materialise. For this reason the law will not regard any state of affairs as constituting a resumption of cohabitation, no matter how affectionate the parties may be to each other, if there has been no full and final reconciliation. There is only a full reconciliation when the parties both intend to resume cohabitation together in a matrimonial home. There is no resumption of cohabitation capable of terminating a period of desertion unless there is a bilateral intention to establish a matrimonial home: *Bartram* v. *Bartram*.[7]

The wife having deserted her husband, it was for her to end the desertion. The presumption is always made in favour of the deserted party that the desertion continues until the deserting party takes steps to terminate it: *Sifton* v. *Sifton*.[8] In the present case the wife did nothing to terminate her desertion. There was no obligation on the husband to do anything at all. English law has no doctrine that the deserted spouse must attempt to secure the return of the deserting spouse. Notwithstanding that he was under no obligation, the husband consistently tried to obtain the return of his wife. He made every effort to reunite his family. He forgave the wife her adultery, attempted to obtain a home in Ipswich and, though there was no finding on this, he offered her a home in London, which she refused. Whatever the quality of her separation before her refusal to return to London, her refusal converted it into desertion and it was sufficient to revive the condoned adultery.

[ORMEROD L.J. She did not say that she would not live in London, but that she preferred not to. That is not evidence of a refusal to return.]

[5] [1942] P. 107; 58 T.L.R. 203; [1942] 1 All E.R. 553.
[6] [1952] P. 203; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076, C.A.
[7] [1950] P. 1; 65 T.L.R. 492; [1949] 2 All E.R. 270, C.A.
[8] [1939] P. 221; 55 T.L.R. 339; [1939] 1 All E.R. 109.

The totality of the evidence suggests that the proper inference is that he made an offer to return and she refused the offer. Thereafter she must have been in desertion.

N. R. Blaker for the wife and *H. S. Law* for the co-respondent were not called on.

ORMEROD L.J. I will ask Willmer L.J. to deliver the first judgment.

WILLMER L.J. stated the facts set out above and continued: Now the question is whether the husband is entitled to the relief which he seeks. It is conceded that the adultery found to have been committed by the wife was condoned, so that that cannot be relied on as a ground for relief, unless it can be shown that it was revived by subsequent conduct. Mr. Campbell, who has argued the case for the husband with great force, submits that he is entitled to relief on the ground of desertion. His case is that the original separation was induced by what amounted to an act of desertion on the part of the wife, and that nothing has since happened to alter the character of the separation. If that be right, not only can he succeed on the ground of desertion (the separation having lasted for more than three years preceding the presentation of the petition), but the effect of that desertion would also be sufficient to revive the condoned adultery after the last act of sexual intercourse had taken place.

The judge came to the conclusion that the original separation was a consensual separation. He further found that throughout the period from 1954 to the filing of the petition, the husband never withdrew his consent to the wife remaining separate and apart from him. In the view of the judge, such efforts as the husband did make by way of suggesting that the parties should live together again were insufficient to reveal any true change of heart on his part. In those circumstances, no desertion having been proved, and the adultery having been condoned, there was no ground on which he could grant relief.

Mr. Campbell has argued that the judge was wrong in coming to the conclusion that the original separation was consensual. His contention is that the wife's confession of adultery, which she made in August, 1954, was a thing which made further married life impossible. Even if it were not true, such a confession would amount to an act of desertion; and, as Mr. Campbell argues, a fortiori it would do so if it were true, as the judge found that it was. I am bound to confess that, when Mr. Campbell first

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developed that argument, I was inclined to be sceptical about it; but he has convinced me that his argument is well founded, resting (as it does) on the principle stated by the Divisional Court in *Baker* v. *Baker*.[1] If that be right, I would agree with Mr. Campbell's submission that the mere fact that the husband was glad to see the wife go would make no difference to the quality of her act in leaving him. In those circumstances, I am prepared to approach this case on the basis for which Mr. Campbell contends, namely, that the wife's departure from the matrimonial home in August, 1954, did amount, in all the circumstances, to an act of desertion.

The next question which arises, therefore, is this: What is the legal effect of the husband's admitted visits to Somerset, accompanied as they were by acts of sexual intercourse? In dealing with that question, we must, I think, bear in mind the judge's finding that those visits and the acts of intercourse were a good deal more frequent than the husband was prepared to admit in evidence. Clearly, the sexual intercourse between the parties had the immediate effect of condoning the wife's previous adultery. There is no dispute about that. But the question arises whether those acts of sexual intercourse had the further effect of bringing to an end the period of desertion which had started when the wife left. In that connection, we were referred to *Perry* v. *Perry*,[2] a decision of this court. There is no doubt that that case did establish once and for all that, where a period of desertion is once running, the mere fact that casual acts of sexual intercourse between the parties take place in the course of attempts at reconciliation is not enough to break the currency of the desertion. The case also established that, in relation to the offence of desertion, no question of condonation arises; the question is not whether the offence is condoned, but whether the desertion continues to run or not.

Perry v. *Perry*,[2] of course, is a decision which is binding upon us, and I do not wish to say anything which can possibly be thought to be in conflict with that decision. But I do not think it covers the facts of the present case. I say that for two reasons. The first reason is this: the wife's desertion in the present case arose out of rather peculiar circumstances. It depended on the circumstance that the wife's confession of adultery, whether it were true or false, was such as to make further married life between these

[1] [1954] P. 33; [1953] 3 W.L.R. 857; [1953] 2 All E.R. 1199, D.C.

[2] [1952] P. 203; [1952] 1 T.L.R. 1633; [1952] 1 All E.R. 1076, C.A.

spouses virtually impossible. That is to say, the desertion depended—and, as I see it, depended entirely—on the wife's confession of adultery. It seems to me that it would be a very odd result if desertion which depended entirely upon the confession of adultery should be held to continue after the adultery which was the cause of it had already been condoned. I confess that I do not see any answer to that difficulty. It seems to me, in the special circumstances of the present case, that the acts of sexual intercourse whereby the adultery was condoned must be regarded as having at one and the same time removed the cause on which the desertion depended.

My second reason for saying that this case is not within the principle of *Perry* v. *Perry*[3] is this: On the evidence which was accepted by the judge, we have here something much more than mere casual acts of sexual intercourse. There was a regular course of conduct, extending over a period of about two years, during which the husband was constantly going down for week-ends and for even longer periods, as and when he could, to stay with the wife. Obviously a question of degree must be involved in deciding whether parties who come together and have sexual intercourse are thereby resuming cohabitation. But on the facts of the present case, bearing in mind the course of conduct which was pursued over such a lengthy period, I find it impossible to say that, on the principle of *Perry* v. *Perry*,[3] the desertion nonetheless continued to run.

In those circumstances, as it seems to me, the effect of what took place was that not only was the adultery condoned, but the desertion, which had started when the wife left the husband in 1954, was brought to an end. The evidence, I think, is rather too vague to put any precise date on the time when the desertion came to an end; but, in my opinion, it could hardly be later than the occasion when the husband paid his visit of five days in October, 1955. The situation then was that, subject to these periodical visits, these two parties were living separate and apart, one in London and the other in Somerset, in circumstances in which it was no longer possible to say that one was a deserter. That is how the situation remained from that time onwards until the petition was filed. The separation during that period of nearly four years must be regarded as a consensual separation, unless it can be shown that there was supervening desertion on the part of the wife. Nobody has suggested that there was any supervening desertion on the part of the husband.

[3] [1952] P. 203.

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The judge, dealing with this aspect of the case, said: "There "is also this series of visits by the husband to the wife, there is "sexual intercourse involving condonation of the wife's adultery "and, I think, indeed I find, that the wife is right in saying that "intercourse occurred much more frequently and extensively "than the husband said it did. I was impressed by her evidence "on that matter. From all those circumstances I draw the "inference that the husband accepted and agreed to the mode of "life which these parties in fact adopted." I stop reading there, because the judge goes on to deal with the initial separation in August, 1954, as to which, for the reasons which I have already given, I do not find myself in agreement with what he said. But up to there I can only say that I find myself in full agreement with the inference which the judge drew as to what the situation was as the result of the husband's visits to Somerset and the resumption of sexual intercourse. There is no evidence that in the course of the husband's visits to Somerset, after the degree of reconciliation evidenced by the sexual intercourse had been achieved, he ever made any practical suggestion to the wife for a resumption of full cohabitation. In those circumstances, as it seems to me and as I understand Mr. Campbell this morning to agree, the case for supervening desertion on the part of the wife must stand or fall according as the facts are found in relation to the husband's alleged written offer of a house in Battersea. We share with the judge the difficulty that we do not know the date when the offer is supposed to have been made. It is said to have been made some time during 1956; but neither of the relevant letters (neither the letter from the husband nor the letter from the wife) has been preserved. Further, the parties were in conflict in their evidence as to whether there ever was such an exchange of letters. The judge made no precise finding on this issue; but I do not shut my eyes to the fact that in general he was disposed to prefer the evidence of the wife, limited though it was by the fact of the mental trouble that she had been through.

[His Lordship then referred to the evidence of the husband on the offer of a home and continued:] It seems to me that, once it is established that as a result of the visits by the husband to Somerset the separation became consensual, it remains a consensual separation until the husband does something practical to bring that consensual separation to an end, to show that he is withdrawing his consent, so as to put the wife in desertion. The burden is on the husband to satisfy the court that something happened to convert the wife into a deserting party. In the

circumstances of the present case, the parties being already separated, that means in practice that the husband must prove that he made some real, practical offer to provide a home, and that such offer was met by an unqualified and final refusal by the wife. I am not to be understood as meaning that the husband must go so far as actually to obtain a house, whether by purchase or on lease. That, I think, would be quite unreasonable. But he must at least, as it seems to me, produce some tangible and practical proposition which the wife can fairly consider. Merely to express a general desire, or put forward the general suggestion, that the parties should live together in Battersea, without making any tangible or practical proposition as to how that is to be done, would not, I think, be enough. That seems to be the view which the judge took; and it is not to be forgotten that in reaching his conclusion he had the advantage, denied to us, of seeing the witnesses and hearing the evidence which they gave. It may be said that the judge's view that this remained a consensual separation throughout was to some extent coloured by the fact that he had already come to the conclusion, erroneously as I think, that the original separation was a consensual separation. I have borne that well in mind in considering whether he was justified in drawing the inference that the continuance of the separation after the Somerset visits was consensual. But it seems to me, having given the matter such consideration as I can, that the judge's inference was well founded, and such as I would myself have drawn in all the circumstances of the case. My conclusion is that from 1955 onwards these parties, separated as they were, were living in that separated condition in accordance with the wishes of both; in other words, that they had found a mode of life which satisfied them both. In the circumstances, I think the judge came to a right conclusion when he held that the state of consensual separation continued right up to the moment when the petition was put on the file.

Accordingly, although I reach my conclusion by a somewhat different route, I do in the end reach the same conclusion as the judge, namely, that no desertion on the part of the wife was ever proved after the original desertion came to an end by reason of the Somerset visits.

In those circumstances, the judge, as it seems to me, came to a correct conclusion when he found that no relief could be granted either on the ground of adultery or on the ground of

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desertion. In my judgment, therefore, this appeal must be dismissed.

DANCKWERTS L.J. I agree, but I should like to add a few words. I must confess that I feel some sympathy with the finding of the judge that the separation was consensual at the beginning of the story. It seems to me that, as a matter of fact, the judge was right in coming to the conclusion that the wife left the family home with the consent, either express or implicit, of her husband, and it is only because of the application of a possibly somewhat artificial rule laid down in *Baker* v. *Baker*[4] that the conclusion must be reached that the wife was then to be treated as deserting her husband. But, be that as it may, when the wife was living at Highbridge, it is clear on the wife's evidence, which the judge accepted, that the husband was visiting his wife from time to time, as often as he wished, and that whenever he did so (except on the first occasion, apparently, when the husband and wife and the two younger children were sharing the same room) he had sexual intercourse with her whenever he wanted; and it is to be observed that he was writing letters to her in which he added those cryptic symbols which are, one understands, supposed to represent kisses. In those circumstances, when the wife received him in that fashion, and he was not relegated to a separate room, and he slept in her bed, it is quite unreal to treat the wife as still being in a position of desertion in respect of her husband. The result of that is that if the petition was to succeed, it must succeed on the basis of there having been some further act of desertion, for if there was originally desertion, it was at an end at that period and, of course, the original cause of the parties being separated, the wife's confession of adultery, had been condoned.

It seems to me that on the evidence the judge was right in reaching the conclusion that he did, that there was no positive requirement by the husband on the wife to come to a house which he had found in London, and also that there was no positive refusal by the wife ever to live in London again. She was a Somerset woman and was unwilling to do it, but, as she expressed it in her evidence, she might have to go back to London because she was the husband's wife. In those circumstances, the conclusion reached by the judge was a correct one, and the appeal should be dismissed.

[4] [1954] P. 33.

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ORMEROD L.J. I agree with the judgment which has just been delivered by Willmer L.J.; and, although we are not accepting in their entirety the conclusions arrived at by the judge, I think there is nothing that I can usefully add. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed with costs in favour of the wife and co-respondent.

Solicitors: *Matthew Morris; Edwin Coe & Calder Woods for Pardoe, David & Shaw, Bridgwater; Victor Mishcon & Co.*

N. P.

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Nov. 2, 30.
Phillimore J.
C. A.
1961
Feb. 24.
Holroyd Pearce, Harman and Davies L.JJ.

Husband and Wife—Maintenance—Divorce—Garnishee—Jurisdiction to order.
Practice—Garnishee proceedings—Divorce—Maintenance—Jurisdiction of Divorce Court.

A woman whose former husband was in arrear with maintenance payments issued a summons for an order garnishing the husband's bank account. The husband appeared under protest and submitted to the registrar, who had made ex parte an order nisi, that the Divorce Court had no jurisdiction to make a garnishee order. The registrar adjourned the summons for hearing by a judge, who made the order absolute. On appeal by the husband:—

Held, dismissing the appeal, that the Divorce Court had jurisdiction to make a garnishee order.

In re Woolgar [1942] Ch. 318; 58 T.L.R. 252; [1942] 1 All E.R. 583 questioned.

Decision of Phillimore J. affirmed.

SUMMONS adjourned into open court.

On November 20, 1959, the former husband was ordered to pay maintenance for the wife, the successful party in a suit for divorce, at the rate of £800 a year, less tax, payable monthly, together with a further sum for the maintenance of the child of the marriage. On July 8, 1960, the husband was committed to prison for failure

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

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to comply with this order, the arrears on May 16, 1960, amounting to over £241. On July 29, 1960, the husband was discharged from prison, the arrears remaining unpaid. The wife, learning that Barclays Bank Ltd. were indebted to the husband, instituted garnishee proceedings. She swore an affidavit in support of the summons stating that £223 8s. 9d. was owing in respect of arrears of maintenance for the period to March 29, 1960, and that Barclays Bank Ltd. were indebted to the husband in the sum of £250. On September 28, 1960, the summons came before a registrar ex parte, and the registrar made an order nisi, pending the hearing of the summons on October 10, 1960. On that date, counsel for the husband stated that the husband appeared under protest, and he submitted that the court had no jurisdiction to make a garnishee order. The registrar adjourned the summons for hearing by a judge.

R. J. S. Harvey for the wife.
Joseph Jackson and *J. C. J. Tatham* for the husband.

The arguments before Phillimore J. are stated in his judgment.

Nov. 30, 1960. PHILLIMORE J., reading his judgment, referred to the circumstances in which the summons came before him, and continued: At the hearing of this summons a solicitor representing the garnishee informed me that his clients, Barclays Bank Ltd., were indebted to the husband, the judgment debtor, in a sum sufficient to meet the amount claimed in the summons, and Mr. Jackson conceded that, subject to the points of law he desired to raise, the order nisi must be made absolute. He then proceeded to make three submissions: (1) That there is no jurisdiction in the Divorce Division to make a garnishee order. (2) That on the assumption that there is such jurisdiction, no order absolute can be made on this summons since the affidavit of the wife, the judgment creditor, sworn on September 27, 1960, had not been served on the husband, the judgment debtor. (3) That, inasmuch as the judgment debtor had already been committed to prison for the arrears in question, the court ought not to allow them to be made the subject of a garnishee order.

In support of his first submission, Mr. Jackson made it quite plain that he is contending that, although this court has made garnishee orders for many years—in fact, as will appear, for nearly 80 years—it has never had any jurisdiction to do so, and that all these orders have been bad. The jurisdiction, he says, has

always been the subject of doubt amongst lawyers. This assertion discloses a discrepancy between the two principal textbooks on divorce. In support of it, Mr. Jackson referred me to the first edition of Rayden on Divorce, published in 1910. At page 148 the author deals with the practice of the court at that time, nearly 50 years ago, in making garnishee orders and there appears at note (c): "these orders *seem*" (counsel emphasised this word) "to be made under the Common Law Procedure Act, 1854 (17 & "18 Vict. c. 125), ss. 61–67; as, although the Statute Law "Revision Act, 1883 (46 & 47 Vict. c. 49), 'repeals' this, "by section 5 (*b*) it saves the jurisdiction thereby conferred." Mr. Jackson points out that this note has survived all subsequent editions and appears at page 428 of the 7th edition, which he himself edited in 1958. It now appears at page 488 in the 8th edition published since I heard the summons and, as he pointed out, has also found its way into the article on Divorce by Karminski J. and Mr. Jackson himself, which is included in the 3rd edition of Halsbury's Laws of England, vol. 12, at p. 475, n. (b).

In the rival work, first published as Browne on Divorce in 1864, it is necessary to go to the 4th edition, published in 1880, to find a similar expression of doubt. In a note at page 561 the author, after reciting the orders applicable to execution under the Judicature Acts, including Order 45, which is the order dealing with garnishee proceedings, goes on: "but as those rules are not applicable to "the Divorce Court, and as the 52nd section of the Matrimonial "Causes Act, 1857, refers to the manner of enforcing decisions "of the High Court of Chancery in practice *at that time*, it seems "the former Rules of Chancery are the ones to be adopted in the "Divorce Court."

Since, as I shall show, the Divorce Court was, at any rate by 1882, making garnishee orders, and since there was certainly no power in the Chancery Division to make such orders in 1857, it is not perhaps surprising that this note should have disappeared from the next edition published in 1889. In the 14th edition of this work, now entitled Latey on Divorce, the editors state in terms at page 985: "Garnishee orders are made in the Divorce "Division and are governed by Rules of the Supreme Court, "Ord. 45."

In this state of editorial disagreement and legalistic rivalry, Mr. Jackson prays in aid an independent witness in Master Wheatcroft's article on Execution in volume 16 of the 3rd edition

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of Halsbury's Laws of England. In dealing with garnishee proceedings at page 79, the author adds note (c), in which he questions whether the practice in the Divorce Division can be based on Order 45 of the Rules of the Supreme Court in the light of the wording of the rules themselves and of two decisions which he cites. These decisions, *In re Woolgar*[1] and *In re Bidie*,[2] I must deal with. This note, and the cases to which the master refers, in fact form the basis of Mr. Jackson's resourceful argument. I say "resourceful" because it does scant justice to the statutory provisions which form the basis of the practice of the Divorce Division. It is the sort of argument which counsel presents when he is required to do something for a debtor who is determined not to pay his debts.

Mr. Jackson's main submission was as follows: The practice of the Supreme Court in regard to garnishee proceedings is contained in Order 45 of the Rules of the Supreme Court under the heading "Attachment of Debts." The Matrimonial Causes Rules, 1957, contain no mention of garnishee proceedings, although they do refer to other methods of enforcing the orders of the court. Thus rule 63 deals with attachment and committal of the person, and rule 64, which has the side title "Enforcement of orders," deals with the procedure to be followed on the issue of a writ of fieri facias or sequestration. Accordingly, it is argued that since the Matrimonial Causes Rules, whilst providing for the enforcement of orders, make no express provision for garnishee proceedings, you cannot import the provisions of Order 45 of the Rules of the Supreme Court unless you can find some warranty in the Matrimonial Causes Rules for so doing. Rule 82 of the Matrimonial Causes Rules provides: "Subject to the provisions of "these Rules and of any enactment, the Rules of the Supreme "Court shall, notwithstanding the provisions of Order 68 thereof, "apply with the necessary modification to the practice and pro- "cedure in any cause or matter to which these Rules apply." Mr. Jackson does not seek to argue that Order 68 of the Rules of the Supreme Court affords any difficulty in this case. Rule 1 of that order provides: "Subject to the provisions of this Order, "nothing in these Rules, save as expressly provided, shall affect "the procedure or practice in any of the following causes or "matters," and at (*d*), last of the list: "Proceedings for divorce "or other matrimonial causes." Mr. Jackson says that a

[1] [1942] Ch. 318; 58 T.L.R. 252; [1942] 1 All E.R. 583.

[2] [1949] Ch. 121; 65 T.L.R. 25; [1948] 2 All E.R. 995, C.A.

garnishee summons is not "a proceeding for divorce or other "matrimonial cause," and, accordingly, that Order 68 affords no difficulty. His argument is simply that you can only by virtue of rule 82 of the Matrimonial Causes Rules, 1957, apply the Rules of the Supreme Court "Subject to the provisions of these Rules "and of any enactment." Since these rules expressly provide for the enforcement of orders by rules 63 and 64, the methods provided by these rules, that is committal, attachment, fieri facias or sequestration, are the only methods by which the orders of the court can be enforced, unless sanction for some other method can be found in some enactment. Thus, in the absence of any reference in the Matrimonial Causes Rules to procedure by judgment summons, it was necessary, he claims, to make the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932, to enable the court to apply this method of enforcing its orders.

In support of this submission counsel relies on the decision of Simonds J. in *In re Woolgar*.[3] In that case a widow sought to recover arrears of alimony due to her under an order of the Divorce Division by taking out a summons in the Chancery Division for the administration of her deceased husband's estate. At that time, the question whether money due under an order for maintenance made by the Divorce Division could be treated as a debt so as to found an action in the Chancery Division was the subject of conflicting authority. In *In re Stillwell*[4] Sargant J. decided that it could be so treated. In *In re Hedderwick*[5] Luxmoore J. refused to follow that decision. In the latter case, having considered two decisions of the Court of Appeal, *Bailey* v. *Bailey*[6] and *Linton* v. *Linton*,[7] Luxmoore J. held that an order by the Divorce Court for payment of alimony did not create a legal debt at common law, and that the only method available to a wife of enforcing such an order was by way of attachment under section 5 of the Debtors Act, 1869. He also held that inasmuch as alimony is a judicial assessment of the husband's obligation to maintain his wife, and as such is inalienable and unassignable, it cannot be affected by agreement between the parties or by the bankruptcy of the husband, and remains subject always to variation and revision by the court, and does not partake of the nature of a legally enforceable debt.

In *In re Woolgar*[8] Simonds J. preferred to follow the decision

[3] [1942] Ch. 318.
[4] [1916] Ch. 365; 32 T.L.R. 285.
[5] [1933] Ch. 669; 49 T.L.R. 381.
[6] (1884) 13 Q.B.D. 855, C.A.
[7] (1885) 15 Q.B.D. 239, C.A.
[8] [1942] Ch. 318.

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of Luxmoore J. in *In re Hedderwick*.[9] He was, however, faced with a subsidiary point as a result of an alteration in the Matrimonial Causes Rules. The rules issued in 1937 contained rule 81, worded as the present rule 82, save that the word "statute" has been replaced by the word "enactment." Counsel for the wife argued that the effect of this rule, as amended, was to import the Rules of the Supreme Court into matters relating to matrimonial causes, and in particular Order 42, r. 24. That rule provides: "Every order of the Court or a Judge in any cause or matter may "be enforced against all persons bound thereby in the same "manner as a judgment to the same effect." Simonds J. dealt with this point as follows[10]: "On the question whether any "difference has been made by the alteration contained in the "Matrimonial Causes Rules, 1937, the suggestion is that, in view "of rule 81, a liability not hitherto provable in the administration "of an estate is now provable. It is said that the result of rule 81 "is to introduce the provisions of Order 42, r. 24, of the Rules "of the Supreme Court under which an order for alimony made "by the Divorce Court can be enforced, as if it were a judgment "to the same effect and, therefore, by way of proof in the "administration of the estate. But rule 81 begins with these "words: 'Subject to the provisions of these Rules,' and I turn, "therefore, to rule 62, which prescribes the way (and, as I think, "the only way) in which an order of the Divorce Court may be "enforced. That rule would be wholly unnecessary if the result "of rule 81 was to substitute, as a means of enforcing the orders "of the Divorce Court, the provisions of Order 42, r. 24, of the "Rules of the Supreme Court. Accordingly, I have come to "the conclusion that rule 81 has not made any difference in this "respect, and that *In re Hedderwick*[11] must still be regarded as "an authority. The application for administration must, there-"fore, be dismissed."

Mr. Jackson argues that I should follow this decision. Rule 62 referred to by Simonds J. is now rule 64 and, to borrow his words, prescribes the way, and the only way (I emphasise this phrase), in which an order of the Divorce Court may be enforced. Just as Simonds J. held that rule 81 did not import the provisions of Order 42, r. 24, of the Rules of the Supreme Court, so I should hold that it does not import Order 45 of those rules. Moreover, this decision on the effect of the rules was, it is said,

[9] [1933] Ch. 669.

[10] [1942] Ch. 318, 320.

[11] [1933] Ch. 669.

approved by the Court of Appeal in *In re Bidie*.[12] That case was heard by Jenkins J.[13] It was a claim by a widow to recover against the estate of her dead husband arrears of maintenance under an order of the justices made pursuant to the Summary Jurisdiction (Married Women) Act, 1895. Jenkins J. held that the wife could not recover, her only remedy being that provided by the Act itself, which remedy did not survive the husband's death. He further held that for this purpose there is no distinction between alimony payable under an order of the Divorce Court and maintenance payable under the order of a court of summary jurisdiction, and followed the decisions of Luxmoore J. in *In re Hedderwick* [14] and of Simonds J. in *In re Woolgar*.[15] It is not surprising that the argument under the Matrimonial Causes Rules advanced in *In re Woolgar* [16] was not apparently advanced in *In re Bidie*,[17] since, of course, those rules could have no application in the case of an order under the Summary Jurisdiction (Married Women) Act, 1895.

In the Court of Appeal, however, junior counsel for the widow, in following, referred to rule 62 of the Matrimonial Causes Rules, 1944, presumably to suggest that since an order for arrears of maintenance can be enforced by writ of fieri facias, it must partake of the nature of a debt.

In his brief judgment Lord Greene M.R. said [18]: "There is only "one point which requires mentioning, and that is the reference to "rule 62 of the Matrimonial Causes Rules, 1944. It was suggested "by Mr. Mulligan that the two cases of *In re Hedderwick* [19] "and *In re Woolgar* [20] were wrongly decided in view of that rule. "It is worth noticing that in neither case was any suggestion "argued that the rule affected the matter at all. In *In re* "*Hedderwick* [21] counsel did not, apparently, think it worth referring to; and in *In re Woolgar* [22] it was referred to, not as "governing the case, but on the assumption that it did not govern "the case and that its effect had been altered by a later rule, "rule 81. I might also say that those rules do not apply to the "present case, which has nothing to do with the Matrimonial "Causes Rules."

As Lord Greene M.R. pointed out, the Matrimonial Causes

[12] [1949] Ch. 121.
[13] [1948] Ch. 697; 64 T.L.R. 309; [1948] 1 All E.R. 885.
[14] [1933] Ch. 669.
[15] [1942] Ch. 318.
[16] Ibid.
[17] [1948] Ch. 697.
[18] [1949] Ch. 121, 125.
[19] [1933] Ch. 669.
[20] [1942] Ch. 318.
[21] [1933] Ch. 669.
[22] [1942] Ch. 318.

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Rules had nothing to do with the point before the court. I do not think that his remarks, which were clearly obiter, can be regarded as approving the observations of Simonds J. in dealing with the point under the Matrimonial Causes Rules in *In re Woolgar.*[23]

What, then, does the argument under the rules amount to? First, doubts have been expressed as to the jurisdiction of this Division to make garnishee orders in the absence of a clear statement as to the origin of the power to do so. However, though the power has been exercised for many years no attempt appears to have been made to dispute the jurisdiction; if there had been a case in which that attempt had been made, I am sure that Mr. Jackson's industry would have produced it. Secondly, the judgment of Simonds J. in *In re Woolgar* [24] is clear. If the wording of rule 81 (now rule 82) of the Matrimonial Causes Rules does not import Order 42 of the Rules of the Supreme Court, it is difficult on the reasoning he adopted to see how it can import Order 45 of the Rules of the Supreme Court. Since rule 82 also refers to powers derived from " any enactment," Mr. Jackson went on to argue that the power to make garnishee orders does not derive from any enactment. Dealing with the reference in note (c) on page 488 of the 8th edition of Rayden on Divorce to the Common Law Procedure Act, 1854, he points out that the effect of section 99, which interprets the terms " court " and " judge," on which the power to make garnishee orders is conferred by sections 61 to 67, is to confer these powers on the judges of the superior courts of common law sitting at Westminster. The Matrimonial Causes Act, 1857, made no reference to the Common Law Procedure Act, 1854, or of the power to garnish. In dealing with the powers of the court it provided by section 22: " In all suits and " proceedings, other than proceedings to dissolve any marriage, " the said Court shall proceed and act and give relief on prin- " ciples and rules which in the opinion of the said Court shall be " as nearly as may be conformable to the principles and rules on " which the Ecclesiastical Courts have heretofore acted and given " relief, but subject to the provisions herein contained and to " the rules and orders under this Act." Again, by section 52: " All decrees and orders to be made by the Court in any suit, " proceeding, or petition to be instituted under authority of this " Act shall be enforced and put in execution in the same or the " like manner as the judgments, orders, and decrees of the High " Court of Chancery may be now enforced and put in execution."

[23] [1942] Ch. 318.

[24] Ibid.

This latter section bears the sidenote: "Enforcement of orders "and decrees."

Crispin v. *Cumano* [25] shows that in 1869 the Court of Chancery had no power to make a garnishee order, and it follows that the Divorce Court had no such power at that date. How, then, is it said the power was conferred? I am content to accept the able argument put forward by Mr. Harvey in answer. His argument was as follows: The history of the remedy by way of garnishee is conveniently stated by Mr. Cababé, a barrister of the Inner Temple, in his book on "Interpleader and Attachment of Debts," published in 1881, at page 147. He says: "There was no way, "previous to the passing of the Common Law Procedure Act, "1854, by means of which a judgment creditor could obtain pay- "ment of his debt, from parties who were indebted to the "judgment debtor; yet far more than the amount of the judgment "debt might be due to the judgment debtor from such parties: "and they would probably be quite indifferent to whom they "paid the debt, so long as they could get a good discharge for it.

"Such being the state of things, the Common Law Procedure "Act, 1854, in sections 60–67, provided a machinery by means "of which a judgment creditor might ascertain what debts were "due to his judgment debtors from third parties, and then pro- "ceed to attach them, and so ultimately obtain payment of "them.

"The practice was further developed by the Common Law "Procedure Act, 1860, ss. 29 and 30; and by these provisions "the practice was regulated at common law till the passing of "the Judicature Act, 1875.

"In Chancery the power to attach debts did not exist. "(*Horsley* v. *Cox*, L.R. 4 Ch. 92.)

"Now, however, under Order 45 of the Rules of the Supreme "Court of 1875, the practice of attachment applies to all divi- "sions of the High Court; and the several rules of the Order "deal with the practice in attachment. These rules are, how- "ever, substantially the same as the provisions of the Common "Law Procedure Acts, 1854 and 1860; so that the decisions under "those Acts are applicable to the present practice."

This passage, in referring to all divisions, is stating that the Divorce Division at this date, 1881, had the power to make a garnishee order. It is accordingly interesting to find that Oakley, the chief clerk of the divorce registry, in the 3rd edition of his

[25] (1869) L.R. 1 P. & M. 622.

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book on Divorce Practice, published in 1889, devotes five pages (see pp. 171–176) to the procedure by way of garnishee order. Moreover, in 1881, in *Whittaker* v. *Whittaker*[26] the court made the first garnishee order recorded in the reports as having been made in this division. In that case the petitioner, who had obtained a decree of dissolution and an order for costs, sought to attach a debt due to the respondent and also to appoint a receiver of the respondent's property. The report in recording the order of the court granting both types of relief records the authority for the appointment of a receiver but makes no reference to any authority in regard to the garnishee order. It seems safe to assume that the making of garnishee orders was already familiar practice in the division. The case was referred to as a precedent for the making of a garnishee order in a matrimonial suit by Gorell Barnes J. in *Edmunds* v. *Edmunds*.[27] Although the headnote to that decision begins: "The principles involved in "garnishee proceedings arising out of decrees and orders in "matrimonial suits examined and considered," it is to be observed that it was not sought to argue there was no jurisdiction to make a garnishee order in such a suit, the only reference to jurisdiction being to the Common Law Procedure Act, 1854, which, it was said, made a chose in action subject to attachment.

As Mr. Cababé indicated in the passage I have read, the jurisdiction to make a garnishee order which was created by the Common Law Procedure Act, 1854, and extended by the Common Law Procedure Act, 1860, was originally enjoyed only by the superior courts of common law sitting at Westminster. That power was extended to other courts, including the court for divorce and matrimonial causes, by the Supreme Court of Judicature Act, 1873, which set up a supreme court comprising two permanent divisions: Her Majesty's High Court of Justice and Her Majesty's Court of Appeal. Section 5, in stipulating the constitution of Her Majesty's High Court of Justice as including "the "Judge of the Court of Probate and of the Court for Divorce "and Matrimonial Causes" provides: "All the Judges of the "said court shall have in all respects, save as in this Act is "otherwise expressly provided, equal power, authority, and juris-"diction"; section 16 states the jurisdiction of the High Court of Justice as follows:

"The High Court of Justice shall be a superior court of "record, and, subject as in this Act mentioned, there shall be

[26] (1881) 7 P.D. 15.

[27] [1904] P. 362.

" transferred to and vested in the said High Court of Justice the " jurisdiction which, at the commencement of this Act, was vested " in, or capable of being exercised by, all or any of the courts " following; (that is to say,)" and then a list of all the principal courts follows, including the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas at Westminster and the Court for Divorce and Matrimonial Causes. The section continues: " The jurisdiction by this Act transferred to the High " Court of Justice shall include (subject to the exceptions here- " inafter contained) the jurisdiction which, at the commence- " ment of this Act, was vested in, or capable of being exercised " by, all or any one or more of the judges of the said courts, " respectively, sitting in court or chambers, or elsewhere, when " acting as judges or a judge, in pursuance of any statute, law, " or custom, and all powers given to any such court, or to any " such judges or judge, by any statute; and also all ministerial " powers, duties, and authorities, incident to any and every " part of the jurisdictions so transferred." The effect of sections 5 and 16 was to confer upon the judge of the Court for Divorce and Matrimonial Causes all the powers hitherto enjoyed by the superior courts of common law sitting at Westminster, including, of course, the power to make garnishee orders. Section 23 provided for the exercise of the jurisdiction and for the making of rules as follows: " The jurisdiction by this Act transferred to the " said High Court of Justice and the said Court of Appeal " respectively shall be exercised (so far as regards procedure and " practice) in the manner provided by this Act, or by such rules " and orders of court as may be made pursuant to this Act; and " where no special provision is contained in this Act or in any " such rules or orders of court with reference thereto, it shall " be exercised as nearly as may be in the same manner as the " same might have been exercised by the respective courts from " which such jurisdiction shall have been transferred, or by any " of such courts." No court can abrogate a jurisdiction conferred by Parliament either by rule or by failure to make a rule, and it follows that as from November 2, 1874, when the Act came into operation, the Court for Divorce and Matrimonial Causes, in issuing process by garnishee, was either acting under some new rule or pursuant to section 23 " as nearly as may be in the " same manner " as such process was issued prior to that date by the superior courts of common law sitting at Westminster.

In 1875 Parliament passed the Supreme Court of Judicature Act, 1875, which was an Act to amend the Supreme Court of

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Judicature Act, 1873. Section 16 reads as follows: "The Rules "of Court in the First Schedule to this Act shall come into "operation at the commencement of this Act, and as to all "matters to which they extend shall thenceforth regulate the "proceedings in the High Court of Justice and Court of Appeal. "But such rules of court, and also all such other rules of court "(if any) as may be made after the passing and before the com- "mencement of this Act under the authority of the next section, "may be annulled or altered by the authority by which new "rules of court may be made after the commencement of this "Act." Then section 17 went on to provide for the making of rules in future, and section 18 provided: "All rules and orders of "court in force at the time of the commencement of this Act in "the Court of Probate, the Court for Divorce and Matrimonial "Causes, and the Admiralty Court, or in relation to appeals from "the chief judge in bankruptcy, or from the Court of Appeal in "Chancery in bankruptcy matters, except so far as they are "expressly varied by the First Schedule hereto or by rules of "court made by Order in Council before the commencement "of this Act, shall remain and be in force in the High Court of "Justice and in the Court of Appeal respectively until they shall "respectively be altered or annulled by any rules of court made "after the commencement of this Act," and then the exception goes on to preserve the powers of the Court for Divorce and Matrimonial Causes to make rules and regulations. It seems unlikely that the Court for Divorce and Matrimonial Causes had at this date passed any rule dealing with garnishee proceedings. The First Schedule contains Order 45, which describes the procedure to be followed in garnishee proceedings. As Mr. Cababé points out, it is, in effect, a codification of sections 61–67 of the Common Law Procedure Act, 1854, and sections 29 and 30 of the Common Law Procedure Act, 1860. In addition, Order 62 provides for exceptions from the rules as follows: "Nothing in these rules "shall affect the practice or procedure in any of the following "causes or matters." The last in the list of such causes reads "Proceedings for divorce or other matrimonial causes." This is the same stipulation as that now contained in Rules of the Supreme Court, Order 68, to which I referred at the beginning of this judgment when dealing with the terms of rule 82 of the Matrimonial Causes Rules.

What, then, was the position after the Act of 1875 came into force in November of that year? The Act of 1873 had granted the Court for Divorce and Matrimonial Causes jurisdiction to make

garnishee orders, its jurisdiction to be exercised either by rule or in the absence of a rule by following " as nearly as may be " the former procedure of the superior courts of common law sitting at Westminster. The Act of 1875 provided a rule in the shape of Order 45, which was in fact a codification of the provisions of the Common Law Procedure Acts on which the common law courts had acted. At the same time Order 62 provided that it was not to affect the practice or procedure in a proceeding for divorce or other matrimonial cause. Dependent on whether garnishee process in the Court for Divorce and Matrimonial Causes was to be termed such a proceeding or cause, that court must either have used Order 45, or the old procedure of the common law courts which it codified. For all practical purposes it comes to the same thing, but this distinction may explain the doubt expressed in the 1st edition of Rayden to which I have referred.

The Statute Law Revision Act, 1883, repealed the Common Law Procedure Acts, but saved the jurisdiction derived from them, as counsel agree. The Matrimonial Causes Rules, 1924, first contained, in rule 97, a rule analogous to the present rule 82. These rules provided as follows: Rules 77 and 78 dealt with attachments and committal in terms similar to those now contained in rule 63. Rule 79 read as follows: " (*a*) In default of " payment to any person of any sum of money at the time " appointed by any order of the court for the payment thereof, a " writ of fieri facias, sequestration, or elegit shall be sealed and " issued as of course in the Registry upon an affidavit of service " of the order and of non-payment," thus covering the field now covered by rule 64. Rule 97 provided: " In any matter of prac- " tice or procedure which is not governed by statute or dealt with " by these Rules the Rules of the Supreme Court in respect of " like matters shall be deemed to apply." The question of whether these rules affected the position depends in fact on whether the reasoning of Simonds J. in *In re Woolgar* [28] was correct.

The Supreme Court of Judicature (Consolidation) Act, 1925, repealed and re-enacted the provisions of the Acts of 1873 and 1875. The relevant sections are sections 4, 18 and 21. Section 4 divided the business of the High Court into three Divisions, the third consisting of the Probate, Divorce and Admiralty Division, provided by subsection (4), which was added by section 6 of the Administration of Justice Act, 1928, " Without prejudice to the " provisions of this Act relating to the distribution of business in

[28] [1942] Ch. 318.

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" the High Court, all jurisdiction vested in the High Court under " this Act shall belong to all the Divisions alike." Section 18 set out the general jurisdiction of the High Court and follows closely the provisions of section 16 of the Act of 1873. Section 18 (1) provides that the High Court shall be a superior court of record. Section 18 (2) vests in the High Court " the jurisdiction which was formerly vested in, or was capable of " being exercised by, all or any of the courts following: " and then follows a list including the High Court of Chancery and the Superior Courts of Common Law, but excluding the Court for Divorce and Matrimonial Causes. The subsection provides further jurisdiction, then subsection (3) states: " The jurisdiction " vested in the High Court shall, subject as otherwise provided " in this Act, include the jurisdiction which was formerly vested " in, or capable of being exercised by, all or any one or more of " the judges of the courts aforesaid respectively sitting in court " or chambers or elsewhere, when acting as judges or a judge, in " pursuance of any statute, law or custom, and all powers given " to any such court or to any such judges or judge by any statute, " and also all ministerial powers, duties and authorities incident " to any and every part of the jurisdictions so vested." Finally, section 21 reads: " The High Court shall have such jurisdiction— " (*a*) in relation to matrimonial causes and matters, as was " immediately before the commencement of the Matrimonial " Causes Act, 1857, vested in or exercisable by any ecclesiastical " court or person in England in respect of divorce a mensa et " thoro, nullity of marriage, jactitation of marriage, or restitution " of conjugal rights, and in respect of any matrimonial cause or " matter, except marriage licences; and (*b*) with respect to " declarations of legitimacy and of validity of marriage, as is " hereinafter in this Act provided; and all such jurisdiction in " relation to matrimonial causes and matters as, under or by " virtue of any enactment which came into force after the com- " mencement of the Act of 1873 and is not repealed by this Act, " was immediately before the commencement of this Act vested " in or capable of being exercised by the High Court constituted " by the Act of 1873."

The effect of these sections is, I think, to preserve and confer on the Divorce Division the jurisdiction granted to the Court for Divorce and Matrimonial Causes by the Acts of 1873 and 1875, including the power to make garnishee orders.

In 1937, when the Matrimonial Causes Rules were revised, rule 81 was issued in the form of the present rule 82, save only

that the word " enactment " was then represented by the word " statute."

This was the state of the rules and statutes at the time when *In re Woolgar*[29] was decided. If it is right that the Divorce Division enjoyed by virtue of statute the power to make garnishee orders, as it was indubitably the practice of the Division to do, it was, of course, inaccurate to state that " the only way " in which an order of the Divorce Court could be enforced was by way of writ of fieri facias or sequestration in accordance with rule 62 of the Matrimonial Causes Rules. It is to be observed, however, that the judge was not referred to the Judicature Acts, or to the question whether the court had power to make a garnishee order. He was solely concerned with the effect of the Matrimonial Causes Rules, and particularly with the question whether the new rule 81 enabled the Division to apply Order 42, rule 24, of the Rules of the Supreme Court, despite the wording of rule 62.

Unfortunately, I have to consider the effect of the rules in order to determine whether the Division, in making a garnishee order, applies Order 45 of the Rules of the Supreme Court, or whether its practice is still based on that of the superior courts of common law prior to 1873, as codified in that order. The question is a somewhat barren one since the distinction appears to involve little practical difference. Nobody can say that rule 82 is exactly pellucid, a criticism which comforts me in differing from the reasons which commended themselves to Simonds J. Rule 82 of the Matrimonial Causes Rules, 1957, reads: " Subject to the " provisions of these Rules and of any enactment, the Rules of " the Supreme Court shall, notwithstanding the provisions of " Order 68 thereof, apply with the necessary modifications to the " practice and procedure in any cause or matter to which these " Rules apply." Order 68, it will be remembered, excludes application of the Rules of the Supreme Court in the case of proceedings for divorce or other matrimonial causes. What does rule 82 mean? I think the rule is governed by the phrase " Subject to the provisions of these Rules and of any enactment " in the sense that, unless either the rules themselves or some enactment provide otherwise the Rules of the Supreme Court are to apply to any cause or matter to which the rules themselves apply. It does not seem to me that this rule attempts to deal with the jurisdiction of the court in any cause or matter to which

[29] [1942] Ch. 318.

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the rules themselves do not apply. It follows that if the jurisdiction of the court to make a garnishee order is not a cause or matter to which the Matrimonial Causes Rules apply, it is not easy to find any rule to govern its process unless it can be said that it is not a proceeding for divorce or other matrimonial cause. If it is not such a proceeding, it would appear that Order 45 of the Rules of the Supreme Court could be applied. If it is such a proceeding but it is not a cause or matter to which the Matrimonial Causes Rules apply, there would seem to be no machinery stipulated for the process of the court.

In attempting to resolve these subtleties it is important to determine what is a " cause or matter to which these rules " apply," and what is the meaning of the phrase in Order 68 of the Rules of the Supreme Court " proceedings for divorce or other " matrimonial causes." Procedure by way of garnishee is clearly procedure to enforce an order of the court. If that order is an order requiring the payment of maintenance pursuant to some proceeding for divorce or other matrimonial cause, the order is, in my opinion, part of such proceeding or cause. The procedure for its enforcement must surely be ancillary to and partake of the nature of the order. Thus, in *Edmunds* v. *Edmunds* [30] Gorell Barnes J. is reported to have referred to *Whittaker* v. *Whittaker* [31] as an instance of garnishee proceedings in a matrimonial suit. I am therefore of opinion, despite the concession offered by Mr. Jackson, that these proceedings are covered by the provisions of Order 68 of the Rules of the Supreme Court. It was to nullify the effect of that order in relation to " proceedings for divorce or other matrimonial causes " and to enable the Divorce Division to supplement its own procedure in relation to such matters that the present rule 82 was first issued as rule 81 in 1937.

The Matrimonial Causes Rules provide for the making of orders of maintenance and alimony so that, in my opinion, garnishee process being ancillary to such orders must be " a matter " to which the rules apply. If this argument be right, I should have thought that at any rate since 1937, the Divorce Division in making garnishee orders was applying the provisions of Order 45 of the Rules of the Supreme Court. It is true that rule 64 of the Matrimonial Causes Rules is entitled " Enforcement of orders," but nothing in its wording shows that the methods it provides

[30] [1904] P. 362, 370. [31] 7 P.D. 15.

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are to be the exclusive methods of enforcing an order. If Parliament has provided another method I do not think that rule 82 prevents the application of the Rules of the Supreme Court. I derive some assistance on this point from the decision of Davies J. in *Worboys* v. *Worboys* [32] applying the Rules of the Supreme Court in regard to substituted service despite the provisions of the Matrimonial Causes Rules with regard to other forms of service.

In conclusion, I have no doubt that this Division is entitled to make garnishee orders, and in my opinion, the practice to be followed is that set forth in Order 45 of the Rules of the Supreme Court. That is, in fact, the practice which has been applied for the better part of 80 years, as is shown by the earlier textbooks to which I have referred. If I am wrong and this practice cannot be directly applied, it follows that this Division is still following the practice of the superior courts of common law sitting at Westminster, which practice is incorporated in that order and is, accordingly, that to be followed. In short, this court in the exercise of its jurisdiction conferred by statute follows the terms of Order 45 of the Rules of the Supreme Court.

I turn to the second point raised by Mr. Jackson, that the affidavit in support of the summons was not served on his client. I think the short answer is that Order 45 of the Rules of the Supreme Court does not require service of the affidavit on the judgment debtor. As to the third point, that since the debtor has already been committed for at any rate part of the amount involved, the judgment creditor will not be permitted to enforce the debt by garnishee, I think this point is disposed of by the decision in *Jinks* v. *Jinks*,[33] and by the provisions of section 5 of the Debtors Act, 1869. Accordingly, I will make this order absolute.

Order nisi made absolute.

The husband appealed.

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Joseph Jackson for the husband. The Divorce Division has not, and never has had, jurisdiction to make garnishee orders. Order 45 of the Rules of the Supreme Court governs the practice of the High Court in garnishee proceedings. By rule 82 of the Matrimonial Causes Rules, 1957, subject to the provisions of

[32] [1953] P. 192; [1953] 2 W.L.R. 901; [1953] 1 All E.R. 857.

[33] [1936] 3 All E.R. 1051, C.A.

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those rules, and of any enactment, the Rules of the Supreme Court apply, with the necessary modification, to the practice and procedure in any cause or matter to which the Matrimonial Causes Rules apply. This means that the Rules of the Supreme Court can only be applied to proceedings in the Divorce Division subject to the provisions of the Matrimonial Causes Rules or of any enactment. There is no mention of garnishee proceedings in the Matrimonial Causes Rules. Therefore, the provisions of R.S.C., Ord. 45, cannot, in the absence of any enactment, be imported into proceedings in the Divorce Division. There being no relevant enactment, it follows that there is no provision empowering the making of a garnishee order in such proceedings. *In re Woolgar* [1] is relied on. [Reference was made to *Bailey* v. *Bailey* [2]; *Linton* v. *Linton* [3]; *In re Mills' Estate* [4]; *Warter* v. *Warter* [5]; *Robins* v. *Robins* [6]; *Ivimey* v. *Ivimey* [7]; *Brydges* v. *Brydges and Wood* [8]; *De Gasquet James (Countess)* v. *Mecklenburg-Schwerin (Duke of)* [9]; *In re Stillwell* [10]; *Capron* v. *Capron* [11]; *In re Hedderwick* [12]; *Findlay* v. *Findlay* [13]; and *In re Bidie*,[14] and to Rayden on Divorce, 1st ed., p. 148; Browne on Divorce, 4th ed., p. 561; and Halsbury's Laws of England, 3rd ed., vol. 12, p. 475, and vol. 16, p. 79.]

Even if the Divorce Division has jurisdiction to make a garnishee order, no such order can be made on the present summons, since the wife's affidavit sworn in support of that summons has not been served on the husband. Further, as the husband has already served a sentence of imprisonment for non-payment of the arrears of maintenance in question, the court ought not to make a garnishee order to satisfy those arrears.

R. J. S. Harvey for the wife. At common law there was no way in which a judgment creditor could obtain payment of his debt from a party indebted to the judgment debtor. This defect was remedied by the Common Law Procedure Act, 1854, and further developed by the Common Law Procedure Act, 1860. The Supreme Court of Judicature Act, 1873, created the Court

[1] [1942] Ch. 318; 58 T.L.R. 252; [1942] 1 All E.R. 583.
[2] (1884) 13 Q.B.D. 855, C.A.
[3] (1885) 15 Q.B.D. 239, C.A.
[4] (1886) 34 Ch.D. 24; 3 T.L.R. 61, C.A.
[5] (1890) 15 P.D. 35.
[6] [1907] 2 K.B. 13; 23 T.L.R. 428.
[7] [1908] 2 K.B. 260, C.A.
[8] [1909] P. 187; 25 T.L.R. 505, C.A.
[9] [1914] P. 53; 30 T.L.R. 329.
[10] [1916] Ch. 365; 32 T.L.R. 285.
[11] [1927] P. 243; 43 T.L.R. 667.
[12] [1933] Ch. 669; 49 T.L.R. 381.
[13] [1947] P. 122; 63 T.L.R. 391; [1947] 2 All E.R. 71, C.A.
[14] [1949] Ch. 121; 65 T.L.R. 25; [1948] 2 All E.R. 995, C.A.

for Divorce and Matrimonial Causes and empowered it to make garnishee orders. The procedure to be followed in relation to such orders was laid down by Order 45 of the 1875 Rules of the Supreme Court. The Supreme Court of Judicature (Consolidation) Act, 1925, conferred on the Divorce Division the jurisdiction previously exercised by the Court for Divorce and Matrimonial Causes. That jurisdiction included the power to make garnishee orders. The practice to be followed is now regulated by R.S.C., Ord. 45. [Reference was made to *Whittaker* v. *Whittaker*[15] and *Edmunds* v. *Edmunds*,[16] and to Cababé on Interpleader and Attachment of Debts (1881), p. 147.]

1961. Feb. 24. Holroyd Pearce L.J. This is an appeal from a garnishee order made by Phillimore J. against the husband in respect of arrears of maintenance. The question is whether the Divorce Court has jurisdiction to make such an order. Undoubtedly it has been making such orders for the past 80 years, but it is argued that it should not have done so. When a useful practice has been in force for so long the court is naturally loth to hold that it is invalid on technical grounds. If there is such a defect, it can easily be set right by alteration of a rule. In 1881, such an order was made in *Whittaker* v. *Whittaker*.[1] It is interesting to find in Oakley on Divorce Practice (3rd ed., published in 1889) five pages (see pp. 171 to 176) dealing with garnishee as a method of procedure in the Divorce Division. Cababé on Interpleader and Attachment of Debts, published in 1881, deals at p. 147 with the development of garnishee proceedings from the Common Law Procedure Act, 1854, and says: "Now, however, "under Order 45 of the Rules of Supreme Court of 1875, the prac- "tice of attachment"—that is, attachment of debt—"applies "to all Divisions of the High Court." In 1904, in *Edmunds* v. *Edmunds*,[2] Gorell Barnes J. made such an order after examining the principles involved in garnishee proceedings arising out of decrees and orders in matrimonial suits. In that case it was not argued that the court had no jurisdiction to make such an order.

The Matrimonial Causes Act, 1857, conferred no such jurisdiction on the Divorce Court. The power to make garnishee orders originated under the Common Law Procedure Act, 1854, and it was amplified by the Common Law Procedure Act, 1860. That jurisdiction was only enjoyed originally by the superior courts of common law sitting at Westminster. The Supreme Court of

[15] (1881) 7 P.D. 15.
[16] [1904] P. 362.

[1] (1881) 7 P.D. 15.
[2] [1904] P. 362.

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Judicature Act, 1873, however, set up a Superior Court consisting of two Divisions, Her Majesty's High Court of Justice, and Her Majesty's Court of Appeal. Section 5 included in the former the judges of the Court of Probate, and of the Court for Divorce and Matrimonial Causes, and enacted: "All the judges of the said "court shall have in all respects, save as in this Act is otherwise "expressly provided, equal power, authority, and jurisdiction." Section 16 provided: "The High Court of Justice shall be a "superior court of record, and, subject as in this Act mentioned, "there shall be transferred to and vested in the said High Court "of Justice the jurisdiction which, at the commencement of this "Act, was vested in, or capable of being exercised by, all or any "of the courts following . . ." The Court for Divorce and Matrimonial Causes is one of those mentioned. The section continues: "The jurisdiction by this Act transferred to the High Court of "Justice shall include (subject to the exceptions hereinafter con-"tained) the jurisdiction which, at the commencement of this "Act, was vested in, or capable of being exercised by, all or any "one or more of the judges of the said courts, respectively, "sitting in court or chambers, or elsewhere, when acting as "judges or a judge, in pursuance of any statute, law, or custom, "and all powers given to any such court, or to any such judges "or judge, by any statute; and also all ministerial powers, duties, "and authorities, incident to any and every part of the jurisdic-"tions so transferred."

Those terms are as wide as they can be, and it seems to me inescapable that those sections conferred on the judges of the Court for Divorce and Matrimonial Causes all the powers hitherto held by the superior courts of common law, which included the power to make garnishee orders.

Section 23, which provided for the making of rules, said: ". . . where no special provision is contained in this Act or in "any such rules or orders of court with reference thereto, it shall "be exercised as nearly as may be in the same manner as the "same might have been exercised by the respective courts from "which such jurisdiction shall have been transferred, or by any "of such courts." As no rules relating to garnishee proceedings were in force in 1881 when the garnishee order was made in *Whittaker* v. *Whittaker*,[3] the presumption is that the court was acting in a way as nearly as might be to the way in which the

[3] 7 P.D. 15.

jurisdiction had been previously exercised by the superior courts of common law.

The judge in the present case rightly observed[4]: "No court "can abrogate a jurisdiction conferred by Parliament either by "rule or by failure to make a rule," and he deduced that when the Supreme Court of Judicature Act, 1873, came into force in 1874, the Court for Divorce and Matrimonial Causes had jurisdiction to make garnishee orders.

The Supreme Court of Judicature Act, 1875, amended the Act of 1873. It provided for Rules of Court being made and altered. Section 17 contained provision for the making of rules. That section applied to the Court for Divorce and Matrimonial Causes. Schedule 1 to the Act contained Rules of Court which were to be in force until altered by the rule-making authorities. One of those rules was Order 45, which varied very little the procedure for garnishee proceedings that had been laid down originally in the Common Law Procedure Acts, 1854 and 1860. The Supreme Court of Judicature (Consolidation) Act, 1925, repealed and re-enacted the provisions of the Acts of 1873 and 1875. In my view, nothing contained in the Act of 1925 altered the position in any material respect, and the judge was right in saying that under it, jurisdiction remained in the Divorce Court to make garnishee orders.

In 1924 there was first introduced into the Matrimonial Causes Rules a rule which adopted the Rules of the Supreme Court in certain respects. In the Matrimonial Causes Rules, 1924, it was rule 97, in the Matrimonial Causes Rules, 1937, it was rule 81, and in the Matrimonial Causes Rules, 1957, it is rule 82. Rule 82 says: "Subject to the provisions of these rules and of any enact-"ment, the Rules of the Supreme Court shall, notwithstanding "the provisions of Order 68 thereof, apply with the necessary "modifications to the practice and procedure in any cause or "matter to which these rules apply." I read that rule as meaning this: Where these rules do not otherwise provide, and where a statute does not otherwise order, the Rules of the Supreme Court shall apply with necessary modifications to the practice and procedure in any cause or matter to which the Matrimonial Causes Rules apply.

It is argued that that is not the right way of reading rule 82, and that it does not import Order 45 of the Rules of the Supreme

[4] Ante, p. 123.

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Court into a matrimonial cause because rule 64 of the Matrimonial Causes Rules, 1957, which deals with enforcement of orders, makes no mention of garnishee proceedings. It is said that by construing rules 82 and 64 together, their effect is that the Rules of the Supreme Court shall not apply to any matter dealt with at all by the Matrimonial Causes Rules, 1957.

Reliance is placed on a decision of Simonds J. in *In re Woolgar*,[5] where he declined to apply Order 42, rule 24, of the Rules of the Supreme Court to arrears of maintenance.

Rule 62 of the Matrimonial Causes Rules, 1937, which was similar to the present rule 64, dealt with enforcement of orders, but made no reference to Order 42 of the Rules of the Supreme Court. Therefore, Simonds J. held that by implication it excluded Order 42. He said[6]: "It is said that the result of rule 81 is to "introduce the provisions of Order 42, rule 24, of the Rules of "the Supreme Court under which an order for alimony made by "the Divorce Court can be enforced, as if it were a judgment "to the same effect and, therefore, by way of proof in the "administration of the estate. But rule 81 begins with these "words: 'Subject to the provisions of these rules,' and I turn, "therefore, to rule 62, which prescribes the way (and, as I think, "the only way) in which an order of the Divorce Court may be "enforced. That rule would be wholly unnecessary if the result "of rule 81 was to substitute, as a means of enforcing the orders "of the Divorce Court, the provisions of Order 42, rule 24, of the "Rules of the Supreme Court."

With all respect, I find myself unable so to view this matter. The Judicature Acts were not referred to in argument, and it may be that Simonds J. might have taken the contrary view if they had been. Phillimore J., in the court below in the present case, found himself unable to follow that reasoning, and observed that it was impossible, merely by an omission of the rule, to take away a jurisdiction which the court already had. Moreover, in *Giles* v. *Giles*,[7] Gorell Barnes J. pointed out that the divorce rules are not exhaustive. Again, in this court in *In the Goods of Patrick*,[8] the court applied the Rules of the Supreme Court by analogy to Divorce Court procedure where the Divorce Court procedure had not made provision for the matter.

I cannot accept Mr. Jackson's careful argument that since rule 64 of the Matrimonial Causes Rules, 1957, refers to methods

[5] [1942] Ch. 318; 58 T.L.R. 252; [1942] 1 All E.R. 583.
[6] [1942] Ch. 318, 320.
[7] [1900] P. 17.
[8] (1889) 14 P.D. 42; 5 T.L.R. 302, C.A.

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of enforcement, but is silent as to garnishee orders, it has the effect, on a proper construction of rule 82, of excluding any garnishee proceedings. Nor can I accept his argument that the jurisdiction which has been transferred to the Divorce Division by the Judicature Acts is limited to relief to be given, and excludes matters of practice and procedure.

A view similar to that which I am now expressing was put forward by Davies J. in *Worboys* v. *Worboys*,[9] where he took from the Rules of the Supreme Court certain provisions for substituted service which were not embodied in the Matrimonial Causes Rules.

I agree with the very careful and exhaustive judgment of Phillimore J., and in my opinion this appeal should be dismissed.

HARMAN L.J. The ingenuity of the husband's counsel constitutes the only possible meritorious element in an appeal entirely without merit in other respects. It has no substance in that it would not produce any result if it succeeded, and it will make no tremor on the face of the law if it fails, as I hold that it does.

DAVIES L.J. I agree.

Appeal dismissed.

Solicitors: *Michael Fox & Co.; Wright & Bull.*

[9] [1953] P. 192; [1953] 2 W.L.R. 901; [1953] 1 All E.R. 857.

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1960 *Dec.* 14, 16.

Cairns J.

Husband and Wife—Co-respondent—Petition against, for damages only—Whether a matrimonial cause—Filed before decree nisi made absolute—Striking out—Matrimonial Causes Rules, 1957 (*S.I.* 1957, *No.* 619), *r.* 3 (2).

A husband was granted a decree nisi of divorce in an undefended suit, on the ground of the wife's adultery with the co-respondent, who was ordered to pay the costs of the suit. On the day before that decree nisi was made absolute, the husband filed a petition claiming damages against the co-respondent. The registrar struck out the second petition on the ground that it infringed rule 3 (2)

[Reported by D. R. ELLISON, Esq., Barrister-at-Law.]

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of the Matrimonial Causes Rules, 1957.[1] On appeal by the husband:—

Held, that the second petition was a matrimonial cause within rule 3 of the Matrimonial Causes Rules, 1957, and, therefore, rightly struck out.

Quaere, whether such a claim would lie after decree absolute.

APPEAL from registrar.

A husband petitioned for divorce on the ground of the wife's adultery with the co-respondent. The suit was undefended, and on July 28, 1959, the husband was granted a decree nisi of divorce and an order for costs against the co-respondent. On March 8, 1960, the day before the decree nisi was made absolute, the husband filed a petition claiming damages only against the co-respondent in respect of his adultery. On July 14, 1960, the registrar ordered that the second petition be struck out, on the ground that it infringed the Matrimonial Causes Rules, 1957, r. 3 (2).[1] The husband appealed.

Dennis Smith for the husband. The registrar was wrong in holding that the husband's petition for damages infringed rule 3 (2) of the Matrimonial Causes Rules, 1957, since such a claim, although a cause, is not a matrimonial cause. A petition, in the context of that rule, means a petition claiming relief in respect of the petitioner's marriage. A petition for damages alone is not such a petition, the relief claimed deriving from the common law action for criminal conversion. A decree nisi of dissolution having been pronounced on the first petition, that petition had been disposed of by a final order, within the meaning of rule 3 (2). [*Kent* v. *Atkinson*,[2] *Hopkins* v. *Hopkins and Castle*,[3] *O'Neill* v. *O'Neill and Piggott*,[4] *Jacobs* v. *Jacobs and Ceen*,[5] *Demetriou* v. *Demetriou*[6] and *Har-Shefi* v. *Har-Shefi*[7] were referred to.]

W. R. K. Merrylees for the co-respondent. The right of a husband to present a petition for damages against a co-respondent is conferred by section 30 of the Matrimonial Causes Act, 1950. That section replaces section 189 of the Supreme Court of

[1] Matrimonial Causes Rules, 1957, r. 3 (2): "A petition shall not be "filed if there is before the court "another petition by the same petitioner which has not been dismissed "or otherwise disposed of by a final "order."

[2] [1923] P. 142; 39 T.L.R. 404.

[3] (1933) 50 T.L.R. 99.

[4] (1949) 65 T.L.R. 624; [1949] 2 All E.R. 649, C.A.

[5] [1950] P. 146; 66 T.L.R. (Pt. 1) 121; [1950] 1 All E.R. 96.

[6] [1950] P. 261; [1950] 2 All E.R. 49, C.A.

[7] [1953] P. 161; [1953] 2 W.L.R. 690; [1953] 1 All E.R. 783.

Judicature (Consolidation) Act, 1925, which was in Part 8 of the Act—the Part headed "Matrimonial Causes and Matters." This indicates that a suit for damages is a matrimonial cause or matter. Since a "matrimonial cause" is defined by section 225 of the Act of 1925 as "any action for divorce, nullity of marriage, "judicial separation, jactitation of marriage or restitution of con- "jugal rights," a suit for damages must be a matrimonial matter, and a petition instituting such a suit falls within rule 3 (2).

Cur. adv. vult.

1960. Dec. 16. CAIRNS J. read the following judgment which, after stating the facts set out above, continued: Mr. Smith puts forward three contentions: (1) that, as is indicated by rule 3 (1) of the Matrimonial Causes Rules, 1957, which reads, "Every matri- "monial cause shall be commenced by filing a petition addressed "to the High Court," rule 3 is dealing only with matrimonial causes, and a claim for damages only is not a matrimonial cause; (2) that the word "petition" in rule 3 (2) must be given a limited meaning, since otherwise it would prevent a petitioner from having on the file at the same time a petition for divorce and, for example, a petition for a declaration of legitimacy, and is to be read as meaning a petition for relief in respect of the petitioner's marriage; (3) that the decree nisi is a final order disposing of the divorce petition.

I can deal shortly with this third point. Whether or not a decree nisi is in some sense a final order, it does not dispose of the petition; unless a petition is dismissed it is not disposed of until decree absolute.

The second point is also, in my opinion, free from difficulty if a suit for damages only can properly be regarded as a matrimonial cause. It may be right to say that some limitation must be imposed on the meaning of the word "petition," but I can see no good reason for construing it more narrowly than as "a "petition in a matrimonial cause."

The really difficult point is the first one. It does appear to me that rule 3 is dealing only with matrimonial causes, or, perhaps I should say, with matrimonal causes and matters, having regard to sub-rule (5), which reads: "Except where these rules other- "wise provide every other application in a matrimonial cause or "matter—(*a*) shall be made to a registrar, and (*b*) shall be made "by summons." Mr. Smith has built up a formidable argument to the effect that a claim for damages is not a matrimonial cause

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or matter. That argument is in two parts, one based on statute and the other on the cases.

The Matrimonial Causes Rules were made under the Supreme Court of Judicature (Consolidation) Act, 1925, and section 225 of that Act defines a "matrimonial cause" as any action for divorce, nullity of marriage, judicial separation, jactitation of marriage or restitution of conjugal rights. If it be said, as Mr. Merrylees was inclined to say, that a suit for damages alone is a "matrimonial matter," the answer is that the definitions of "cause," "plaintiff" and "defendant" in the same section, read together, show plainly that such a suit is a "cause" and therefore it cannot be a "matter," because "matter" is defined as "every proceeding in court not in a cause." Therefore, says Mr. Smith, a suit for damages alone is a cause but not a matrimonial cause.

Mr. Merrylees points out, on the other hand, that Part 8 of the Act of 1925 is headed "Matrimonial Causes and Matters," and that section 189, the section which dealt with claims for damages whether on a petition for divorce or not, was in Part 8. He argues that the Matrimonial Causes Rules are made under section 99 (1) (*j*) of the same Act, giving power to make rules with respect to matters which were then regulated by rules and regulations in force with respect to practice and procedure in matrimonial causes and matters, which must include everything in Part 8. A weakness of this argument is that Part 8 also includes legitimacy declarations (see section 188), and yet it was thought necessary to refer to these specifically in section 99 (1) (*j*).

If Mr. Smith is right, there are no rules of court at all relating to claims for damages alone in respect of adultery. This is so improbable a situation that I should not accept it as the actual one unless driven to it, and, in my opinion, there are cogent reasons for saying that such a claim for damages is a matrimonial cause. The long title of the Matrimonial Causes Act, 1950, begins: "An Act to consolidate certain enactments relating to "matrimonial causes in the High Court in England and to "declarations of legitimacy and of validity of marriage and of "British nationality. . . ." I note that in this title declarations of legitimacy and of validity of marriage are specifically mentioned, but there are no words which would cover actions for damages unless they are within the expression "matrimonial "causes." Yet it is section 30 of this Act, replacing section 189 of the Judicature Act, which now gives the right to claim damages for adultery. Another reason why I consider that a

claim for damages is a matrimonial cause is this: if the wife were alive she had, under section 33 of the Matrimonial Causes Act, 1857, to be joined as a respondent, and although this provision is not now contained in a statute (and it would be begging the question to say that it is contained in rule 9 of the Matrimonial Causes Rules, 1957), it cannot be supposed that if this kind of claim was a matrimonial cause from 1857 onwards it has since ceased to be. Again, any damages recovered may clearly be dealt with under section 30 (3) of the Matrimonial Causes Act, 1950, and settled on the children of the marriage, if any, or as provision for the maintenance of the wife.

These various grounds tend, in my opinion, to support the view that a claim for damages is a matrimonial cause. I acknowledge the difficulty of the restricted definition in the Judicature (Consolidation) Act, 1925, but as against that can be set the provisions of the same Act on which Mr. Merrylees relies. Moreover, as he pointed out, the definition in the Act is only conclusive when construing the Act itself, and, I may add, not even then if the context otherwise requires.

In my opinion, on the construction of the statutes and rules, a suit for damages for adultery is a matrimonial cause. I must, however, examine the cases referred to by Mr. Smith and see whether this view is contrary to authority.

In *Kent* v. *Atkinson* [1] Hill J. held that a petition for damages was independent of, and not ancillary to, a petition for divorce, and could be brought notwithstanding the death of the wife. He suggested, obiter,[2] that the action would lie after the decree absolute. This does not, in my opinion, prevent the suit from being a matrimonial cause.

In *Hopkins* v. *Hopkins and Castle* [3] Langton J. heard an action for damages which had been instituted after decree nisi. The case is reported on the question of the extent to which defences available in the divorce proceedings and not then raised can be set up in answer to a claim for damages. Mr. Smith is entitled to point out that the fact that the petition was filed after decree nisi was not held to be a bar to the proceedings, and although no rule corresponding to the present rule 3 (2) was then in force there was a long-established practice to the same effect: see *Demetriou* v. *Demetriou*.[4] However, as the point was not taken the case is, in my view, no real authority on the matter.

[1] [1923] P. 142; 39 T.L.R. 404.
[2] [1923] P. 142, 148.
[3] (1933) 50 T.L.R. 99.
[4] [1950] P. 261; [1950] 2 All E.R. 49, C.A.

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In *O'Neill* v. *O'Neill and Piggott* [5] it was held by the Court of Appeal that a co-respondent could appeal against an award of damages after decree absolute, notwithstanding his failure to appeal against the decree nisi: see the Judicature (Consolidation) Act, 1925, s. 31 (1) (*e*). This further emphasises what had been held in *Kent* v. *Atkinson*,[6] that the claim for damages is not merely ancillary to the claim for dissolution of marriage, but it does not prevent the former from being a matrimonial cause.

Finally, in *Har-Shefi* v. *Har-Shefi*,[7] the Court of Appeal held that the Divorce Division had jurisdiction to entertain a suit for a declaration that a marriage is invalid. It was argued here that such a proceeding is not included in any definition of a matrimonial cause or matter and, therefore, cannot be within the Matrimonial Causes Rules, and there is no reason why a claim for damages should not be in the same position. I can see no analogy between the two types of case. I express no opinion whether or not an action for such a declaration is a matrimonial cause or matter, but if it is not it is because it is not mentioned in the Matrimonial Causes Act, 1950, while an action for damages is.

I therefore conclude that the registrar was right to strike out this petition. This does not necessarily mean that after decree nisi the husband cannot set up a claim for damages. He may be able, by leave, to amend his petition under rule 15 in order to do so. On grounds of fairness it seems highly desirable that he should have to obtain leave before making such a claim at so late a stage, because the co-respondent might have allowed to go undefended a suit which he would have defended if a claim for damages had originally been made. Of course, if Hill J. was right in the view he expressed obiter in *Kent* v. *Atkinson*,[8] the claim may still lie after decree absolute. It may be, however, that it is then too late, because the petitioner is no longer a husband. The courts have not in modern times viewed with favour separate claims for damages for adultery (see *per* Langton J. in *Hopkins* v. *Hopkins and Castle* [9]), and it need not be a matter for any regret if a husband who does not claim damages in his petition for divorce finds himself without a right to make such a claim thereafter.

[5] (1949) 65 T.L.R. 624; [1949] 2 All E.R. 649, C.A.

[6] [1923] P. 142.

[7] [1953] P. 161; [1953] 2 W.L.R. 690; [1953] 1 All E.R. 783.

[8] [1923] P. 142, 148.

[9] 50 T.L.R. 99.

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In the present case I am of opinion that the registrar was right in striking out the petition, and the appeal must, therefore, be dismissed.

Appeal dismissed with costs.

Solicitors: *Johnson, Jecks & Landons for Landons, Brentwood; Clare & Clare.*

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Dec. 7, 8, 16.

Cairns J.

Husband and Wife—Settlement—Variation—Adopted child—Interest of natural children—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 25.

Adoption—Divorce—Settlement—Variation—Position of adopted child—Interests of other children—Matrimonial Causes Act, 1950, *s.* 25.

A wife who had been granted a decree absolute of divorce applied under section 25 of the Matrimonial Causes Act, 1950,[1] for the variation of a marriage settlement in which provision had been made for the husband during his life and, after his death, for his widow and, thereafter, for the issue of the marriage, namely, two sons, by seeking to restore her own life interest and to restrict the rights of the husband under the settlement. She also sought a decision whether the adopted daughter of the family should be given an interest under the settlement. The registrar reported and applications to vary his report in certain respects were made by both parties. On the question whether the registrar's decision to admit the adopted daughter of the parties to an interest under the settlement should be confirmed:—

Held, (1) that it was well established that the court had jurisdiction under section 25 of the Matrimonial Causes Act, 1950, to vary a marriage settlement so as to confer a benefit on a child who was a stranger to the settlement provided that the variation also conferred an adequate benefit on the natural children of the marriage interested in the settlement which must, in some measure, be pecuniary.

Scollick v. *Scollick* [1927] P. 205; *Newson* v. *Newson* (1934) 50 T.L.R. 399; *Tagart* v. *Tagart and White* (1934) 50 T.L.R. 399; *Garforth-Bles* v. *Garforth-Bles* [1951] P. 218; [1951] 1 T.L.R. 449;

[1] Matrimonial Causes Act, 1950, s. 25: "The court may after pronouncing a decree for divorce or for nullity of marriage enquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit. . . ."

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[1951] 1 All E.R. 308; *Best* v. *Best* [1956] P. 76; [1955] 3 W.L.R. 334 ; [1955] 2 All E.R. 839 applied.

(2) That the other variations which were to be made in the settlement resulted in such substantial benefits to the natural children of the marriage as to compensate them for the loss incurred by the admission of the adopted daughter to benefit thereunder, but that both the pecuniary and the sentimental interest of the natural children of the marriage would be best served if the interest of the three children were to be in the proportion of three-eighths for each of the natural children of the marriage and one-quarter for the adopted daughter, and that the settlement should be varied accordingly.

Per curiam. The question whether the words in section 25 of the Matrimonial Causes Act, 1950, "for the benefit of the children "of the marriage or of the parties" qualify the word "settled," thus leaving the court's discretion at large, or the word "application" so that the variation must be such as to benefit the natural children of the marriage of the parties, is not of such importance as might appear since the variations must be considered as a whole, and the court is bound, according to its general equitable jurisdiction, not to sanction any variation which would be detrimental to the natural children of the marriage.

Whitton v. *Whitton* [1901] P. 348 considered.

APPLICATIONS to vary a registrar's report as to variation of a settlement.

The following statement of facts is summarised from those set out in the judgment. The parties were married in 1942 and on November 5, 1959, a decree dissolving the marriage on the ground of the husband's cruelty was made absolute. There were three children of the family, two boys who, at the time of the hearing were aged 17 and 15, and a girl who was born on November 25, 1949, and was adopted by the parties on November 15, 1951. On February 3, 1947, the husband's father settled a sum, worth at the date of the hearing approximately £29,000 and yielding a gross annual income of £1,180, on protective trusts to pay the income to the husband for life and then to his widow "during her widowhood" with remainder as to both capital and income to each of the husband's children or remoter issue to whom he should appoint and in default thereof equally between his children; with ultimate remainder to the husband's sister. The trustees of the settlement had unrestricted powers of investment and under clause 4 could, in their discretion, raise up to £8,000 from the fund to start the husband in business or otherwise for his benefit or advancement in the world as they saw fit. The wife applied under section 25 of the Matrimonial Causes Act, 1950, for the registrar to vary the

settlement by, inter alia, restoring the second life interest to her, notwithstanding that she was not the widow, and extinguishing the husband's power to appoint: (a) to the children of an after-taken wife; and (b) as to one-half of the trust fund. She also asked for a decision as to whether the adopted girl had an interest in the settlement.

On October 10, 1960, Mr. Registrar Russell reported on the wife's application and submitted, inter alia, that if a variation were made in favour of the wife by giving her the interest she would have enjoyed as a widow, she should make some sacrifice and he proposed that her second life interest should accordingly be reduced to three-quarters of the total fund. The registrar further proposed that the husband should retain the right under clause 4 of the settlement of receiving up to £8,000 of the fund but that no capital should be paid to him without his first giving to the trustees a charge on a reversionary interest held by him under his father's will, and that the husband's power of appointment as to either the capital or income should be extinguished. Taking account of the benefit that would thereby enure to the children of the marriage and of the fact that at the hearing before him it had been agreed that the adopted daughter should, if possible, be brought within the settlement by some variation, the registrar considered that the adopted girl could be brought into the settlement on equal terms with the boys without there being on balance any detriment to them, and accordingly, proposed that the term "child or children" used in the settlement should in all respects include the adopted child of the parties as if such child were a child of the body of the husband and wife.

On October 25, 1960, the wife gave notice to vary the registrar's report by, inter alia, deleting the recommendation that her interest should be reduced to three-quarters of the income of the settlement and substituting a provision that she should be entitled to receive the whole of the income of the settlement for her life interest and by providing that no after-taken wife, or the children of any after-taken wife, should have any interest in the settlement save upon the failure of the children of the family of the parties to attain a vested interest in the settlement.

On November 10, 1960, the husband gave notice to vary the registrar's report by, inter alia, the inclusion of a proviso specifying certain purposes for which sums could be paid to him under clause 4 of the settlement without a charge by him on his reversionary interest. If the variation were acceded to, the husband in a letter to the wife's solicitors proposed making a

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settlement of one-sixth of the reversionary interest upon all three children of the family in the proportion of three-eighths for each boy and one-quarter for the girl.

Cairns J., having acceded to the variations proposed by both parties, proceeded to consider the question of the variation of the settlement in the interest of the adopted daughter of the parties, on which the application is reported.

D. Armstead Fairweather for the wife. *Best* v. *Best* [2] is authority for the proposition that the court has power to vary a settlement of this nature in favour of an adopted child provided that no sacrifice is made on the part of the natural children of the parties benefiting under the settlement. In this case the variations proposed give a substantial benefit to the two sons of the marriage in that their interests in the fund are irrevocably assured to them. This provides an adequate quid pro quo to the natural children of the parties which effectively counterbalances any detriment resulting to them from the admission of the adopted daughter to the settlement.

John Macgregor for the husband. The question of law which arises in this matter is whether the court's power of variation under section 25 of the Matrimonial Causes Act, 1950, extends to bringing in an adopted child who was hitherto a stranger to the settlement. This question is quite distinct from the further question whether, on the facts of this case, the court ought to bring in the adopted child and, if so, on what terms. It is submitted that the court has the necessary power. It would be strange if Parliament intended adopted children to be equated with natural children for so many purposes but not for this one. It is further submitted that in section 25 the words " settled for " the benefit of the children or of the parties " should be read together. The court's " application of the property " could then be for the benefit of anyone, including a stranger, provided the court thinks fit.

In *Best* v. *Best* [2] the court's power was recognised as existing although not exercised on the facts of that case. The question of whether the wrong Act was considered has for present purposes no relevance. In at least two cases under section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, a stranger was brought in: *Scollick* v. *Scollick* [3]; *Newson* v. *Newson*.[4] That

[2] [1956] P. 76; [1955] 3 W.L.R. 334; [1955] 2 All E.R. 839.

[3] [1927] P. 205.

[4] (1934) 50 T.L.R. 399.

section was re-enacted in section 25 of the Act of 1950. Parliament must be taken to have adopted in 1950 the judicial interpretation previously put upon the same wording: *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.*[5]

On the facts, the two sons will benefit from the inclusion of the adopted daughter, but it is submitted that the variation should include the proposed amendments to the registrar's report.

Ambrose Crawley for the two sons of the parties. The settlement was made in 1947. The passing of the Adoption Act, 1950 (see section 13 (2) and also the Adoption Act, 1958, s. 16 (2), and the Fifth Schedule, paragraph 4 (1) and (2)), could therefore give the adopted daughter in this case no rights under the settlement. The Adoption Act, 1950, although it puts adopted children in the position of children of the marriage for certain purposes cannot alter the meaning of section 25 of the Matrimonial Causes Act, 1950, which empowers the court to vary a marriage settlement, and in neither Act is there any express provision giving a court jurisdiction to vary such a settlement in favour of adopted children. The two Acts of 1950 were enacted on the same day but made no reference to each other and it cannot be said that the meaning of section 25, which re-enacted section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, was affected in any way by section 13 of the Adoption Act, 1950.

It is therefore submitted that the court has no jurisdiction to let in the adopted daughter under section 25 unless a contrary intention appears: see Adoption Act, 1926, s. 5 (2), and *In re Gilpin.*[6] It follows that it is possible to provide for children adopted in the circumstances of the present case only under the general equitable jurisdiction, whereby the court can approve a variation of a settlement provided that the interests of any children already benefiting are safeguarded and that they are given an adequate quid pro quo.

Although in *Best* v. *Best*[7] Karminski J. held that he had jurisdiction to vary a settlement in favour of a subsequently adopted child, no variation was in fact made on the ground that there was no satisfactory quid pro quo and the holding as to jurisdiction was, therefore, obiter. *Best* v. *Best*[7] is not a wholly satisfactory decision, because it proceeds on the basis of the Adoption Act, 1950, whereas the settlement (as here) preceded the Act of 1950, and the provisions of the Adoption Act, 1926,

[5] [1933] A.C. 402, 411; 49 T.L.R. 391, 392, H.L.

[6] [1954] Ch. 1; [1953] 3 W.L.R. 746; [1953] 2 All E.R. 1218.

[7] [1956] P. 76.

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were therefore applicable: see Adoption Act, 1950, Sch. V, para. 4, which appears to have been overlooked.

On the issue of the quid pro quo, *Newson* v. *Newson* [8] must be read in conjunction with *Tagart* v. *Tagart and White* [9] (and also *Scollick* v. *Scollick* [10]) to show that, while moral and emotional factors are to be considered, their effect is limited to tipping the scale in favour of making a variation which is substantially fair on a balance of the purely financial factors. The necessity of a substantial quid pro quo remains and the registrar was wrong in holding that it is nowadays of less importance.

The husband's proposals for varying the registrar's report contain a balance of advantage to the sons sufficient to counterbalance the detriment implicit in the wife's notice to vary, but there is no further margin of advantage sufficient to supply the lack of an adequate quid pro quo in the registrar's report for the inclusion of the adopted daughter in the settlement.

W. Glanville Brown for the adopted daughter. It is clear that the variation propounded in the registrar's report, whether amended as suggested or not, materially benefits the two sons. Where an interest is dependent on one life only, the issue are in a materially better position than where the interest is dependent on two lives. The whole of the fund is irrevocably assured to the children if the power is extinguished subject to the amendment of the registrar's report.

Best v. *Best* [11] is authority for the proposition that the court has power to vary a settlement such as the present in favour of an adopted daughter. The sons will not be worse off materially, and the moral and emotional circumstances are all in favour of letting in the adopted daughter.

The registrar's report should be affirmed subject to the amendment.

CAIRNS J. stated the facts and dealt with the proposed variations of the report, and continued: Having thus disposed of all the issues raised by the two notices to vary I now come to the really difficult problem in the case, namely, whether I can and should confirm the giving to the adopted daughter of an interest under the marriage settlement, and, if I can, and if I am satisfied that such provision should be made, how matters may be arranged so that the variation will benefit, or at least not damnify, the natural children of the marriage.

[8] (1934) 50 T.L.R. 399.
[9] Ibid. 402.
[10] [1927] P. 205.
[11] [1956] P. 76.

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To start with, it is, in my opinion, rightly conceded that the adopted daughter has no interest in the settlement as it stands. She is not a "child" of the husband at common law, and the Adoption Act, 1926, does not assist her. The settlement was made before the passing of the Adoption Act, 1950, and she had not been adopted at the time of the settlement. For these reasons no rights under the settlement are conferred on her by that Act or by the Adoption Act, 1958. (See the Act of 1950, section 13 (2), and the Act of 1958, section 16 (2) and the Fifth Schedule, paragraph 4, sub-paragraphs (1) and (2).) Nor is there any statutory provision which expressly authorises the variation of a settlement in her favour. The variation of settlements is provided for in section 25 of the Matrimonial Causes Act, 1950, while maintenance is dealt with in section 26. The Matrimonial Proceedings (Children) Act, 1958, s. 1 (1), expressly provides that section 26 of the Act of 1950 is to be applied to adopted children, but no such provision is made in relation to section 25. The Variation of Trusts Act, 1958, does not assist the adopted daughter since she has no interest under the settlement as it stands.

I have, therefore, to construe section 25 of the Matrimonial Causes Act, 1950, in the light of the relevant authorities and to consider whether, and if so on what conditions, I can bring the adopted daughter into the settlement. [His Lordship then referred to the section and continued:] A section in similar terms was first enacted in section 5 of the Divorce and Matrimonial Causes Act, 1859, and was thereafter carried into section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and eventually into section 25 of the Matrimonial Causes Act, 1950. One of the difficulties of the section is that it is not clear from it whether the words "for the benefit of the children of the marriage "or of the parties" qualify the word "settled" or the word "application." If it is the former then, so long as the settlement is a settlement for the benefit of the children or the parties, the court's discretion is at large; but if it is the latter then the variation has to be such as will benefit the parties or the children. It was, I think, the submission of all counsel before me that the former meaning is the right one. I find it difficult to adopt that construction because it seems a strained reading, and also because a comparison with the language of section 24 (1) tends to support the other reading. This point is not, however, of so much importance as I was inclined to think during the argument. The variations must be considered as a whole: see *Whitton* v.

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Whitton,[1] where Sir Francis Jeune P. said[2]: "But I think I am "entitled to consider what the effect of the whole order I ought "to make will be, and not that of any particular portion alone." Considered as a whole, the variations are at least clearly for the benefit of one of the parties, namely, the wife. It is a recognised principle that the variations must not, taken as a whole, be to the disadvantage of the children, but this principle is, I think, derived from broad equitable considerations and not from the words of the Act. To quote again from the same judgment of Sir Francis Jeune P.[3]: "But one has in these cases to consider "what is really for the benefit of the children, because I think "the authorities show that nothing must be done that on the "whole would be for the disadvantage of the children. This does "not so much turn on the words of the Act of Parliament, but "generally on the principle that the children, being innocent "parties, ought not to have their interests injuriously affected by "the conduct of either of their parents."

Now it is well established by authority that the variation may be such as to confer a benefit on a stranger to the settlement provided it also confers a benefit on children interested in the settlement, and I think the authorities establish that it is sufficient if the variation contains some benefit to those children which can be regarded as being approximately equivalent to what is taken from them for the benefit of the stranger. In *Scollick* v. *Scollick*[4] Hill J. varied a settlement under section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, by introducing into it a power of appointment for the wife in favour of any children she might have by a second marriage which had already taken place. He considered that this would be for the benefit of the existing child, because her step-father would be more likely to be generous in her upbringing and education if he did not have to save money to provide for any further children of his own. Hill J. said[5]: "It must always be in the interest of "a child, if she has half-brothers and half-sisters, that she should "not be in some superior position in her expectations to them. "I do not think that that is an important consideration. But "unless there is some pecuniary interest I do not think I ought "to interfere on that ground taken by itself." That passage reads rather curiously, and I cannot help feeling that what Hill J. intended to say was "I *do* think that that is an important

[1] [1901] P. 348.
[2] Ibid. 353.
[3] Ibid. 353.
[4] [1927] P. 205.
[5] Ibid. 209.

"consideration." What is clear is that he did think it was a consideration, but that there must be some pecuniary benefit to the child as well, to justify the variation. The pecuniary benefit which he did find sufficient was not one which could be measured precisely and set against the detriment involved in giving rights to unborn children who were strangers to the settlement. Nevertheless, Hill J. approved the variation which conferred such rights. In *Newson* v. *Newson*,[6] Sir Boyd Merriman P., under the same section, made a similar variation, being satisfied that the variation itself and certain collateral arrangements ancillary to the proposed scheme were sufficient compensation to the child there concerned for the disadvantage accruing to him from the variation. In *Tagart* v. *Tagart and White* [7] Sir Boyd Merriman P. refused a similar variation, saying that in such cases the court would require to be satisfied that the variation as a whole was clearly for the benefit of the existing child or children, and in that case he was not so satisfied. The section was re-enacted in 1950, after the cases I have referred to, and it must be taken, therefore, that Parliament intended it to be applied as it had been in those cases: see *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.*[8]

In *Garforth-Bles* v. *Garforth-Bles* [9] Pearce J., in approving a variation, attached [10] weight to the probable effect of the variation in maintaining happy relations between father and child. In *Best* v. *Best* [11] Karminski J. was asked to approve a variation conferring an interest on an adopted child. No financial compensation at all was afforded to the natural child of the marriage and the variation was supported solely on the ground that it would provide equality between two boys who had been brought up as brothers and that it was for the benefit of the natural son of the marriage that there should be such equality. It is clear that Karminski J. considered that he had jurisdiction to make a variation bringing in an adopted son provided a sufficient benefit to the natural son of the marriage was thereby achieved. But he said [12]: "Mr. Ormrod emphasised that in none of the reported "authorities had the power to appoint to a future spouse or to "the children of a subsequent marriage been given on sentimental or personal grounds alone. In all the authorities to

[6] (1934) 50 T.L.R. 399.
[7] (1934) 50 T.L.R. 399, 402.
[8] [1933] A.C. 402, 411; 49 T.L.R. 391, 392, H.L.
[9] [1951] P. 218; [1951] 1 T.L.R. 449; [1951] 1 All E.R. 308.
[10] [1951] P. 218, 222.
[11] [1956] P. 76; [1955] 2 All E.R. 839.
[12] [1956] P. 76, 86.

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" which I was referred the variation was accompanied by a " substantial monetary benefit to the child or children of the " marriage. I can well understand the desire of the wife here to " put these two boys on an equality in respect of financial " matters, since to do so would at least remove any feeling of " future inequality between them. But in my view, although " I fully appreciate the importance of this argument, I feel myself " unable to obtain equality of this kind at the price of so large " a financial sacrifice on the part of Anthony." Anthony was the natural son of the marriage.

In my opinion, the result of these cases is to establish that the court has jurisdiction to admit an adopted child to benefit under the settlement, provided that anything which the natural children of the marriage are called upon to give up is compensated for in some sufficient way. In considering this compensation the court cannot do any exact sum, because such intangible factors as the benefit of equality, or something approaching equality, within the family can be taken into account, though there must be some pecuniary benefit as well.

The conclusion that I have come to is, that it is possible to bring the adopted daughter into the settlement and to make other variations which on the whole will be an adequate quid pro quo for the boys. But I should not feel satisfied that this could be effected, without undue detriment to the husband and the wife, if the adopted daughter were placed, as the registrar proposed, on an equal footing with the boys. In my opinion, the right way to divide the interests of the children is the same as that which the husband has put forward for the new settlement, namely, in the proportion of three-eighths for each boy and one-quarter for the girl. I consider that this is fair, partly because the needs of a girl may be considered to be rather less than those of a boy and partly because the boys are entitled as of right to benefit under the settlement and she is not. I think that as far as the " sentimental " aspect of the case is concerned, the boys, assuming them to be normal boys, would be pleased that their adopted sister should have this share, though they might resent it if she were placed on an exact equality with them.

What financial gain do the boys get from the variation as a whole? That depends partly on whether the husband could have been required to restore that part of the £8,000 which has been advanced to him and to obtain no more similar advances. This issue was not fully argued before me and I do not consider that there is any need for me to determine it. The registrar was of

opinion that the husband was "almost certainly" entitled to these sums. It is sufficient for me to say that it is a very substantial benefit to the boys to have the £8,000 restored to the settled fund or, alternatively, to have the three-quarters share of the new settlement which the husband has promised, rather than to be left with a very doubtful disputed claim to have the £8,000 restored.

As I have differed from the registrar's view that the wife's interest should be reduced by a quarter, I cannot, of course, take that reduction into account as part of the benefit to the boys. This would not, however, be a very important benefit to them: actuarially it would amount to approximately one year's income (the husband being about four years older than the wife, and one-quarter of the income being involved). The fact that I do not confirm this reduction of the wife's interest is, however, one of the factors that have led me to think that the boys should each retain a greater interest than the adopted daughter receives.

Finally, there is the benefit to the boys of having the power of appointment extinguished and the rights of any future wife or children of the husband postponed to their own. The termination of the power of appointment as between the boys is, in itself, I consider, a benefit to each of them. The assurance of obtaining a fixed share of a fund is of more value than the uncertain prospect of obtaining a greater or less share of it. It has been said that the husband is unlikely to marry or to have another family. Though there exists a circumstance that may make remarriage less likely than usual, it was one which, so far as I know, has always existed, and which did not prevent the marriage recently dissolved, nor the birth of the two children of that marriage. The husband is a reasonably well-to-do man of 42, and the risk of his remarrying, and of his leaving a widow (who would have had a life interest prior to that of the boys if the settlement had not been varied), and children (who might have shared with or been altogether preferred to the boys I am concerned with), is, in my opinion, quite sufficient to make the variation which excludes the interests of such persons a very useful one from the boys' point of view. I am satisfied that the benefits I have mentioned are sufficient to enable me to approve a variation of the settlement bringing in the adopted daughter to the extent I have named.

[Upon counsel for the two natural sons of the marriage raising the question of the disposition of the share in the settlement of any of the children who failed to obtain a vested interest, his Lordship continued:] In the event of the adopted daughter dying before

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attaining a vested interest in the settlement, her interest would go to the natural sons of the marriage equally. My intention would be that if both sons were to die before attaining a vested interest, then the whole should go to the adopted daughter, but that if one of the sons so dies, then the fund should vest in the proportion of three-fifths for the surviving son and two-fifths for the adopted daughter.

Solicitors: *Barnett Janner, Davis & Janner; Cripps, Harries, Hall & Co.*

E. J.

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July 10, 11, 19; *Aug.* 26; *Oct.* 24, 28.

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Husband and Wife—Nullity—Bigamy—Implied recognition of marriage by husband—Whether husband estopped from alleging marriage to be bigamous.

Estoppel—Per rem judicatam—Husband and wife—Marriage—Validity—Bigamous marriage—Implied recognition by husband before justices—Nullity petition by him.

Estoppel—Conduct, by—Husband and wife—Maintenance proceedings on footing marriage valid—Both parties aware that marriage void—No estoppel against nullity petitions.

The husband, who had previously married in Canada in 1937, went through a ceremony of marriage with the wife in England in 1945, both parties being aware that the ceremony was probably bigamous. In 1957 the husband left the wife and in proceedings before the justices admitted having deserted her. A maintenance order was made against him. In 1959 the husband established that his lawful wife was still alive in 1958, but the justices refused to revoke the maintenance order on the ground that, having admitted his desertion, and so, by implication, the validity of the marriage, the husband was estopped from alleging that the marriage ceremony was bigamous and void.

The husband then petitioned for a decree of nullity on the ground of bigamy. The wife, by her answer, sought the same relief or, in the alternative, a divorce on the grounds of adultery and desertion:—

Held, (1) that the doctrine of estoppel did not preclude a party to a bigamous ceremony of marriage from alleging it to be null and void even though he had previously asserted its validity in judicial proceedings.

Miles v. *Chilton* (*orse. Miles*) (1849) 1 Rob.Eccl. 684 and *Andrews* v. *Ross* (1888) 14 P.D. 15 applied.

(2) That since, on the facts of the case, an estoppel per rem judicatam could only arise from the decision of the justices, which

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was not binding on the High Court, and an estoppel in pais could not arise as both parties had been aware of the position, each party was entitled to a decree of nullity.

PETITION for a decree of nullity.

In 1937 the husband married a Miss Tapley in Canada and in December, 1945, he went through a ceremony of marriage with the wife in England, although both parties were aware that the ceremony was probably bigamous. In 1957 the husband deserted the wife and, at the hearing of a complaint issued against him by the wife before the Luton justices, admitted the desertion, and a maintenance order was made against him. The husband later fell into arrears of payments under the order and then sought to question the validity of the ceremony of marriage. On inquiry it was established that the lawful wife was still alive in July, 1958, and the husband accordingly applied to the justices for a revocation of the order on the ground that it presupposed that the marriage to the wife was valid, whereas it was bigamous and void ipso jure. On May 26, 1959, the justices dismissed the husband's complaint on the ground that, having admitted desertion and so, by implication, the validity of the marriage, he was estopped from alleging it to be void. The husband then filed a petition in the High Court seeking a decree of nullity. The wife, by her answer, pleaded that the husband, by his admission of desertion, was estopped from alleging that the marriage was null and void. In the alternative, she sought a decree of nullity on the ground of the admitted bigamy, or if the marriage was held to be valid, a decree of divorce on the ground of her husband's adultery and desertion.

Nigel Curtis-Raleigh for the Queen's Proctor. Estoppels cannot bind the court: *Thompson* v. *Thompson*.[1] The cases of *Wilkins* v. *Wilkins*,[2] *Woodland* v. *Woodland* (*orse. Belin*)[3] and *Bullock* v. *Bullock*,[4] which are to the effect that the doctrine of estoppel may prevent the court from pronouncing a bigamous marriage void, are inconsistent with *Miles* v. *Chilton* (*orse. Miles*)[5] and *Andrews* v. *Ross*,[6] and the latter are to be preferred. The dicta of Lord Merriman P. on the subject of estoppel in

[1] [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161, C.A.
[2] [1896] P. 108; 12 T.L.R. 212, C.A.
[3] [1928] P. 169; 44 T.L.R. 495.
[4] [1960] 1 W.L.R. 975; [1960] 2 All E.R. 307.
[5] (1849) 1 Rob.Eccl. 684.
[6] (1888) 14 P.D. 15.

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Bullock v. *Bullock* [7] were obiter, and *Thompson* v. *Thompson* [8] was not cited to the court in that case.

The Matrimonial Causes Act, 1950, s. 4, imposes a duty upon the court, on a petition for divorce, to inquire, so far as it reasonably can, into the facts alleged. The phraseology in which that duty is worded was introduced by the Matrimonial Causes Act, 1937, prior to which the Supreme Court of Judicature (Consolidation) Act, 1925, s. 178, merely required the court to satisfy itself as to the facts alleged. That was the phrase used in the Matrimonial Causes Act, 1857, and defined the scope of the court's duty when the cases of *Wilkins* v. *Wilkins* [9] and *Woodland* v. *Woodland* (*orse. Belin*) [10] were decided. If the present suit is to be regarded as a suit for divorce, since the wife's answer contains a prayer for dissolution, section 4 applies. If that section is inapplicable to the present suit, a similar duty is imposed on the court since it was the practice of the ecclesiastical courts, in dealing with nullity suits, to make such inquiry, and by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 32, the court is required to follow, as nearly as may be, the practice of the ecclesiastical courts.

An estoppel cannot operate to override the substantive law. To apply the doctrine of estoppel to prevent the court from declaring a bigamous marriage void would, however, produce that result.

Both parties knew, at the time of the bigamous ceremony, the true state of affairs. In those circumstances, one party cannot be estopped, against the other, from alleging the invalidity of the ceremony, since neither was prejudiced by the deception. [Reference was made to *G.* v. *M.*,[11] *Square* v. *Square* (*orse. Bewicke*),[12] *W.* v. *W.*,[13] *Tindall* v. *Tindall* [14] and *Society of Medical Officers of Health* v. *Hope*.[15]]

N. R. Blaker, for the wife, adopted the argument of counsel for the Queen's Proctor. He referred to *Valier* v. *Valier* (*orse. Davis*).[16]

F. R. N. H. Massey, for the husband, also adopted the argument of counsel for the Queen's Proctor. He referred to

[7] [1960] 1 W.L.R. 975.
[8] [1957] P. 19.
[9] [1896] P. 108.
[10] [1928] P. 169.
[11] (1885) 10 App.Cas. 171; sub nom. *Gordon* v. *Merricks*, 1 T.L.R. 326.
[12] [1935] P. 120.
[13] [1952] P. 152; [1951] 1 T.L.R. 879; [1952] 1 All E.R. 858, C.A.
[14] [1953] P. 63; [1953] 2 W.L.R. 158; [1953] 1 All E.R. 139, C.A.
[15] [1960] A.C. 551; [1960] 2 W.L.R. 404; [1960] 1 All E.R. 317, H.L.
[16] (1925) 133 L.T. 830.

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Bonaparte v. *Bonaparte* (*orse. Megone*)[17] and *Chard* v. *Chard* (*orse. Northcott*).[18]

PHILLIMORE J. stated the facts and continued: The question of law raised is whether I should refuse a decree of nullity to the husband in this case on the ground that, although the marriage was admittedly bigamous and therefore void ab initio, he is estopped from so alleging.

There is a line of authority which suggests that the doctrine of estoppel may prevent a court from declaring a bigamous marriage null and void. The first of those cases is *Wilkins* v. *Wilkins*.[1] A wife petitioner, who had married the respondent husband in 1865, petitioned the court in 1892 for a judicial separation on the ground of his adultery. He, by his answer, denied the adultery and alleged that the marriage was bigamous and so null and void on the ground that a man the wife had married in 1854 was still living at the date of the marriage in 1865. The suit was heard by a jury, who found on the evidence that the husband had committed adultery, and that the wife's first husband had died before her marriage in 1865. She accordingly obtained a decree. Not long afterwards the first husband returned to England and the husband thereupon filed a petition for a decree of nullity. The wife set up the verdict of the jury as constituting an estoppel per rem judicatam. The case came before Gorell Barnes J., who indicated that he felt a difficulty in granting a decree in face of the previous verdict of the jury, and, without deciding the point, adjourned the case for an application by the husband to the Court of Appeal for a new trial of the original suit. The report covers only this application, which was granted on terms. The judgment of Lopes L.J.[2] deals solely with the question whether it was right under the rules to grant a new trial and the terms to be imposed, but that of Lindley L.J.[3] refers to the difficulty created by the verdict and decree in the nrst suit, whilst Kay L.J.[4] deals briefly with the point of estoppel. He says[4]: "It is said that "the applicant is estopped by the former verdict and decree from "proving this fact. But, as evidence is now forthcoming which "could not by the exercise of reasonable diligence have been "obtained at the first trial, there must be some mode of getting

[17] [1892] P. 402; 8 T.L.R. 759.
[18] [1956] P. 259; [1955] 3 W.L.R. 954; [1955] 3 All E.R. 721.
[1] [1896] P. 108; 12 T.L.R. 212, C.A.
[2] [1896] P. 108, 113.
[3] Ibid. 112.
[4] Ibid. 114.

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"over an estoppel arising from a verdict which was obtained "under a misapprehension of the real facts. In my opinion we "have jurisdiction to enlarge the time for moving for a new trial "of the first suit, and I am also clearly of opinion that the case "is one in which the jurisdiction ought to be exercised."

I do not think that Kay L.J. was committing himself to the view that the plea of estoppel was good, any more than was Lindley L.J.[5] in speaking of the difficulty and a new trial as the proper mode of getting over it. The report does not suggest that any authority on the question of estoppel was cited to the Court of Appeal, and in the absence of any report of the hearing before Gorell Barnes J. I do not know whether any authority was cited to him. The Court of Appeal granted a new trial and by consent ordered that the verdict in the first suit and the decree of judicial separation be set aside. On a subsequent application Gorell Barnes J. granted a decree of nullity. Whilst the course taken was eminently sensible and practical, this case, in the absence of any decision on the point, provides somewhat slender support for the contention that estoppel can prevent the court from granting a decree of nullity where a marriage is shown to be bigamous.

The second case, *Woodland* v. *Woodland* (*orse. Belin*),[6] is in a different category. The husband and wife married in 1914 at a time when the wife's previous marriage had not been validly dissolved. In 1921 she brought a petition for restitution of conjugal rights, which the husband did not defend, with the result that she obtained a decree, the wording of which, being in the usual form, contained an express finding that the parties were husband and wife. In 1928, the husband having petitioned for a decree of nullity, the case came before Hill J., who adjourned it for argument on the question whether the decree of restitution did not constitute an estoppel. After hearing the argument the judge dealt with the general principles of estoppel and concluded[7]: "... I am unable to find that there is anything in the "law peculiar to this division which renders the general law of "estoppel inapplicable to this case." He then proceeded to refer to the terms of the decree of restitution and to the case of *Wilkins* v. *Wilkins*,[8] describing the observations of Kay L.J.[9] as a clear recognition of the estoppel raised by the decree of judicial

[5] [1896] P. 108, 112.
[6] [1928] P. 169; 44 T.L.R. 495.
[7] [1928] P. 169, 172.
[8] [1896] P. 108.
[9] Ibid. 114.

separation in that case. Hill J. then proceeded to dismiss the petition. This is a clear decision in favour of estoppel per rem judicatam and the facts are close to those before me in the present case. I confess, however, that I find it impossible to concur in Hill J.'s conclusion [10] that there is nothing "peculiar "to this division which renders the general law of estoppel in- "applicable to this case." I also think that in treating Kay L.J.'s observations [11] as a clear expression of recognition of the estoppel he was going beyond what Kay L.J. intended.

Finally I turn to *Bullock* v. *Bullock*,[12] a decision of Lord Merriman P. and Collingwood J., sitting in the Divisional Court. In that case the husband and wife married in 1944. The wife had previously married in 1921, but at the time of her remarriage had not heard of her former husband for many years. At the time of this remarriage she informed the husband of this and of her history. In 1959 the wife sought an order from the justices on the ground of her second husband's desertion, he contesting the matter on the ground that their marriage in 1944 was bigamous—a thoroughly unmeritorious defence in the light of his knowledge at the time of their marriage. The justices found, on the facts, that the first husband must be presumed to have died before 1944, and that the marriage was, accordingly, not bigamous and made an order in favour of the wife. This order was upheld by the Divisional Court on the facts, but in the course of his judgment [13] Lord Merriman P. dealt at some length with the possibility of applying the doctrine of estoppel in the light of the husband's knowledge of the facts at the time he entered into the marriage. He made it clear [14] that he was not expressing any final view on the position, and expressly founded his decision, as did Collingwood J.,[15] on the finding of fact made by the justices. However, his observations on the subject of estoppel were concurred in by Collingwood J., and although not binding upon me are entitled to the greatest respect, so much so that I thought it right to ask the Queen's Proctor for his assistance in this case. In the course of his judgment [16] the President reviewed the cases of *Wilkins* v. *Wilkins* [17] and *Woodland* v. *Woodland* [18] and the decision of Dr. Lushington in *Miles* v. *Chilton*.[19]

[10] [1928] P. 169, 172.
[11] [1896] P. 108, 114.
[12] [1960] 1 W.L.R. 975; [1960] 2 All E.R. 307.
[13] [1960] 1 W.L.R. 975, 976.
[14] Ibid. 980.
[15] Ibid. 981.
[16] Ibid. 976.
[17] [1896] P. 108.
[18] [1928] P. 169.
[19] (1849) 1 Rob.Eccl. 684.

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He expressed the view that the report in *Wilkins* v. *Wilkins* [20] makes it plain that [21] " . . . unless this new trial had been " ordered, so that the verdict and judgment could be set aside, " the husband would have been estopped from denying the " validity of the marriage," and concluded that [22] " . . . it is " not universally true, certainly as was assumed in *Miles* v. " *Chilton* (*orse. Miles*),[23] that merely because a bigamous marriage " is involved that prevents an estoppel from operating." He also indicated [24] that he was not convinced that an estoppel in pais as opposed to an estoppel per rem judicatam, which was the basis of *Wilkins* v. *Wilkins*,[25] " cannot operate in such a case."

It is well established that a bigamous marriage is void ipso jure or void ab initio, whichever phrase is to be preferred. Inasmuch as it is void it is, of its very nature, incapable of being converted into a valid marriage, as can happen in the case of a marriage which is merely voidable as opposed to void. I am content to adopt the words of Lord Greene M.R. in *De Reneville* v. *De Reneville*,[26] who put it thus: " a void marriage is one that will " be regarded by every court " (I stress the word " every ") " in " any case in which the existence of the marriage is in issue " as never having taken place and can be so treated by both " parties to it without the necessity of any decree annulling it." It seems to me that it would be contrary to all principle if a ceremony, which is by definition null and void, could be converted into something valid and binding and capable of conferring status by the act or inaction of a party to it. It would surely be remarkable as a proposition of law if this court were to be prevented from declaring the truth, namely, that a marriage is bigamous and so correcting the status of parties to it and of their dependants merely because one or both of them had chosen to assert its validity or because one of them had failed to dispute or had concurred in the assertion of its validity by the other.

This court deals not merely with disputes between parties but with status. Marriage is not an ordinary contract—it is an institution which confers status on the parties to it and upon the children that issue from it, as Lord Penzance pointed out in *Mordaunt* v. *Mordaunt*.[27] It is an old maxim that estoppels are odious because they tend to shut out the truth—see Halsbury's Laws of England, 3rd ed., volume 15, p. 203—and it is well

[20] [1896] P. 108.
[21] [1960] 1 W.L.R. 975, 978.
[22] [1960] 1 W.L.R. 975, 979.
[23] 1 Rob.Eccl. 684.
[24] [1960] 1 W.L.R. 975, 979.
[25] [1896] P. 108.
[26] [1948] P. 100, 111; 64 T.L.R. 82; [1948] 1 All E.R. 56.
[27] (1870) L.R. 2 P. & M. 109, 126.

settled that they cannot override the law of the land; see Phipson on Evidence, 9th edition, page 705. If the law declares a bigamous marriage void and criminal, is this court nevertheless to treat it as valid and refuse to declare the truth by reason of the conduct, however unmeritorious, of one or both of the parties to it? The consequences to which this doctrine might lead are surely remarkable. If this court recognises the plea of estoppel it leaves one of the parties to it with two husbands, regarded as such by law, or two wives as the case may be—a state of polygamy or of polyandry, both of which are foreign to the law of England. Suppose that in such a case the bigamous spouse is prosecuted and convicted and the bigamy declared, he or she would nevertheless remain legally married in the eyes of the matrimonial court. Suppose there has been a child of the bigamous union, is that child in the eyes of the law the offspring of a valid or bigamous marriage? Or suppose that such a child or any other party interested comes to this court for a declaration that the marriage is bigamous. In that case no estoppel would arise owing to the difference in parties and this court would declare the nullity which it had refused to declare at the suit of a party to the illegal union.

It may be said, what is the court to do in a case such as *Wilkins* v. *Wilkins*,[28] when after a fair trial a false decision has been reached? I think the short answer is that it must declare the truth, now that the truth is known, and then correct the error, just as it has to do if, for example, judgment is obtained against a party that does not exist. In *Thompson* v. *Thompson* [29] the Court of Appeal considered the whole question of estoppel in relation to proceedings for divorce and concluded that estoppel cannot bind the court so as to fetter its statutory duty under section 4 of the Matrimonial Causes Act, 1950, "to enquire into "the facts alleged." This duty, in its present wording, derives from the corresponding section in the Act of 1937, when the wording of section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, which in turn was derived from section 25 of the Matrimonial Causes Act, 1857, was altered. Prior to 1937 the court was required to be satisfied as to the facts alleged.

Counsel for the Queen's Proctor sought to argue that the change in wording in 1937 imposed a duty on the court which did not exist when the cases of *Woodland* v. *Woodland* [30] and

[28] [1896] P. 108.

[29] [1957] P. 19; [1957] 2 W.L.R. 138; [1957] 1 All E.R. 161, C.A.

[30] [1896] P. 108.

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Wilkins v. *Wilkins*[31] were decided. He also suggested that although section 4 of the Act of 1950 refers only to a petition for divorce as opposed to nullity, the duty arises in the present case since the form of the answer involves both nullity and divorce. For myself, I would prefer to rest my decision on broader grounds. It was always the practice of the ecclesiastical court to inquire into the facts, and that practice, in the absence of statutory definition or alteration, remains applicable in cases of nullity by reason of the provisions of section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925.

The case of *Miles* v. *Chilton (orse. Miles)*[32] affords, I think, compelling authority. In that case the husband sought a decree of nullity alleging bigamy on the part of his wife. She, by her answer, pleaded inter alia that he had known all the facts and, knowing them, had induced her to marry him, telling her that she had been lawfully divorced in proceedings which had been instituted by the first husband in collusion with the petitioner. Dr. Lushington, in his judgment,[33] rejected the plea in the wife's answer. He referred to the general principles of estoppel and to the absence of authority for their application to marriage, which he said[34] "is more than a civil contract." It is plain from his judgment that he had considered all the available authorities and, having done so, had failed to find any case in which a previous averment that a marriage was valid had been held to preclude the petitioner, who had made it, from subsequently asserting the contrary and obtaining a decree of nullity.

This case was followed in *Andrews* v. *Ross*.[35] The judgment of Butt J. puts it very well[36]: "The facts of this case are "very short. The petitioner was the sister of the first wife "of the respondent, who died shortly after marriage. The peti- "tioner was present at the marriage of her sister to the respon- "dent, and was, therefore, perfectly well aware of whatever "impropriety or illegality there may have been in the marriage. "She chose to go through the ceremony of marriage with a know- "ledge of all the circumstances. In that state of things, and in "accordance with all the principles of law administered in other "courts, she would not be allowed to sue for a declaration of "nullity of marriage. In other words she would not be allowed to "get rid of any obligation that she had entered into with her eyes

[31] [1928] P. 169.
[32] 1 Rob.Eccl. 684.
[33] Ibid. 692.
[34] Ibid. 694.
[35] (1888) 14 P.D. 15.
[36] Ibid. 16.

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" open. But the authorities cited, and especially the authority of " *Miles* v. *Chilton*,[37] show that the Ecclesiastical Courts have " applied a different rule, and that the principles prevailing in " regard to contract of marriage differ from those prevailing in all " other contracts known to the law. It is not necessary that I " should go into the cases, suffice it to say that the authorities " show that the Ecclesiastical Courts would pronounce this mar- " riage null and void under the circumstances to which I have " referred. By section 22 of the Matrimonial Causes Act of 1857 " it is provided that in all suits and proceedings other than " proceedings to dissolve any marriage, the court shall pro- " ceed to act and give relief on principles and rules as " nearly as may be conformable to the principles and rules " on which the Ecclesiastical Courts have heretofore acted. " By them I am bound. Therefore I consider myself called upon " to declare this marriage null and void, but I shall refuse the " petitioner her costs." I agree with the submission of counsel for the Queen's Proctor that if I have to choose between the two lines of authority that led by *Miles* v. *Chilton* (*orse. Miles*)[37] is to be preferred.

Apart, however, from these considerations, I do not see how the doctrine of estoppel can apply in the present case. In so far as there is any question of estoppel per rem judicatam it can only arise from the decision of the justices, which is not binding upon this court. If it is put as an estoppel in pais I think the short answer is that both these people knew the position. The wife went before the justices and asserted by implication the validity of her marriage because she wanted maintenance. The husband submitted to an order, thus by implication conceding the validity of the marriage because he did not want to be prosecuted for bigamy. I am content to adopt the words of Langton J. in *Square* v. *Square* (*orse. Bewicke*)[38]: " If two people with the " same source of information assert the same truth, or agree to " assert the same falsehood at the same time, I cannot see how " either can be estopped as against the other from asserting differ- " ently at a later time." For these reasons I have thought it right to grant both parties a decree of nullity.

Order accordingly.

Solicitors: *F. W. P. Lupton, The Law Society, Divorce Department; John Q. Clayton & Co., Luton; Queen's Proctor.*

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[37] 1 Rob.Ecc. 684.

[38] [1935] P. 120, 126.

END OF VOLUME AND OF PROBATE SERIES FOR 1961.

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